Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

Sarah Husain, et al.,
Petitioners,

v.

Marlene Springer, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Second Circuit held that elected officers of a student government at a public college did not engage in state action when they acted in their official capacities to impound a special election edition of a student newspaper funded by student activity fees to prevent dissemination of the newspaper's prominent endorsements of a slate of candidates running in a student election.

The court below also held that a college president who nullified the results of a student election because the president concluded that the editors and staff of the student newspaper inappropriately used student activity fees to publish an issue strongly favoring a slate of candidates in the election violated clearly established law by imposing an unconstitutional viewpoint based restriction on the rights of student journalists, candidates and voters and was not entitled to qualified immunity on summary judgment. The Second Circuit also held that two college student election regulations that the college president claimed she relied on when she determined that the content of the student newspaper was inappropriate did not pertain to the content of student newspapers and that the college had no written guidelines that could be construed to limit the content of the student newspaper. However, the court below remanded for the trier of fact to determine whether the college president reasonably relied on the aforementioned two election rules.

Five questions are presented for review:

1. Are elected officers of a student government at a public college state actors within the meaning of 42 U.S.C. §1983 who can be sued for acting in their official capacities to impound an issue of a student newspaper to suppress dissemination of viewpoints expressed by the editors of the newspaper?

2. Does the constitutional prohibition on the exercise of unbridled discretion by officials regulating traditional public forums apply to officials regulating expressive activities in limited public forums?

3. Is reliance on a written rule a defense to personal liability by a public officer who is not entitled to qualified immunity and who violates clearly established law by imposing a viewpoint based penalty on speech in a limited public forum?

4. May a public officer's reliance on a facially vague regulation granting the officer unbridled discretion to classify and penalize speech in a limited public forum be deemed reasonable by a trier of fact?

5. After holding that a public college president imposed a viewpoint based restriction on speech by nullifying the results of a student election in retaliation for publication of an election issue of a student newspaper that featured prominent endorsements and articles zealously advocating election of a slate of candidates in the election, did the court below contravene this Court's precedents prohibiting enforcement of vague regulations of protected speech that give decision makers unbridled discretion when the court below remanded to the trier of fact the determination of whether the college president reasonably relied on

two student election campaign rules that the court below held (i) were facially inapplicable to the content of student newspapers and (ii) set no guidelines for determining what editorial content would be inappropriate under the rules?

PARTIES TO THE PROCEEDING

PETITIONERS:
SARAH HUSAIN, *Member of the* College Voice *Editorial Board*; KASADORE RAMKISSON, *Member of the* College Voice *Editorial Board*; NEIL SCHULDINER, *Member of the* College Voice *Editorial Board*; WILLIAM WHARTON, *Member of the* College Voice *Editorial Board*; DEVON BLINTH, College Voice *Staff Member*; KATHLEEN McHUGH, College Voice *Staff Member*; COLLEEN McGRAHAM; JEFF McGRAHAM; and MARK J. PESEAU.

Petitioners were all students at the College of Staten Island ("CSI") in Spring 1997.

RESPONDENTS:
MARLENE SPRINGER, *President of the College of Staten Island ("CSI")*; JOSEPH CANALE, *CSI Student Government ("SG") President*; JUERGEN SCHNETZER, *SG Publications Commissioner*; CHARLO ALMEDA, *SG Senator*; CHRISTOPHER ALVAREZ, *SG Senator*; KELLYANNE BIESTY a/k/a KELLYANNE GALLO, *SG Senator*; and LUIS CRUZATTE, *SG Senator*.

AMICUS:
The Student Press Law Center of Arlington, Virginia appeared as *amicus curiae* in support of Petitioners.

FORMER PARTIES HAVING NO INTEREST

The following parties were appellees in this case at the Second Circuit and have no interest in this petition.

Carol Jackson
Michael Silva
Winsome Alston
Sibi Geevarghese
Andre Woods
Mary Anne Christensen
W. Ann Reynolds
Robert E. Diaz
Roy Moskowitz
Michael Solomon
Kathleen Galvez
City University of New York
College of Staten Island
Student Election Review Committee of the College of Staten Island
Board of Trustees of the City University of New York
Marla Brinson
Matthew Goldstein

The following parties were appellants in this case at the Second Circuit who were not CSI students in Spring 1997 and have no interest in this petition:

Iman el-Sayed
Renee Marhong

CORPORATE DISCLOSURE STATEMENT

The City University of New York ("CUNY") is a public authority governed by a board of trustees appointed by the governor of the State of New York and the mayor of the City of New York authorized to operate colleges, graduate schools and related facilities within the City of New York pursuant to Articles 125 and 126 of the New York State Education Law, 6201, *et seq.*; 6301, *et seq.*

The College of Staten Island ("CSI") is one of nineteen colleges and graduate schools operated by CUNY.

The CSI Student Government ("SG") is an elected body authorized under Sections 15.2 and 16.1 through 16.4 of the Bylaws of the CUNY Board of Trustees ("CUNY Bylaws"), and Article VII of the CSI Governance Plan, to charter and regulate student organizations including student publications, and to allocate a portion of the mandatory student activity fees paid by CSI students to support student publications and other student activities. Allocations by the SG are subject to approval by a board consisting of six elected students and seven college administrative employees and faculty members appointed by the college president and subject to veto by the college president.

The *College Voice* is a student newspaper and political journal chartered and regulated by the SG pursuant to CUNY Bylaw 15.2. The *College Voice* receives funding from student activity fees allocated by the SG.

The Student Union is an unincorporated association of CSI students that in Spring 1997 ran a slate of

candidates for 37 positions on SG and other CSI governance bodies. The Student Union candidates included Petitioners Sarah Husain, Neil Schuldiner, William Wharton, Devon Blinth, Kathleen McHugh, Colleen McGraham and Jeff McGraham.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit dated July 13, 2007 is reported at 494 F.3d 108 and is reproduced in Appendix A, at 1a, *infra*. The district court opinions dated March 28, 2002 and August 30, 2004 are reported at 193 F. Supp. 2d 664 and 336 F. Supp. 2d 207 and reproduced *infra* as Appendix B at 58a and Appendix C at 77a, respectively.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on July 13, 2007. An Order of this Court pursuant to Supreme Court Rule 13(5) issued by Justice Ruth Bader Ginsburg on October 2, 2007 Ordered that Petitioners file their Petition For A Writ Of Certiorari by November 28, 2007. A second Order by Justice Ginsburg issued on November 16, 2007 extended the time for filing this Petition until December 10, 2007. This Petition is filed within the time specified in the last Order.

Accordingly, this Court has jurisdiction over this Petition pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The First and Fourteenth Amendments to the United States Constitution are reproduced in Appendix D at 95a, *infra*.

42 U.S.C. §1983 and New York State Education Law §6206[7][a] are reproduced, in Appendix E at 96a, *infra*.

Selected provisions of the Bylaws of the Board of Trustees of the City University of New York (the "CUNY Bylaws") are reproduced as Appendix F at 99a, *infra*.

Article VII of the Governance Plan of the College of Staten Island (the Constitution of the College of Staten Island Student Government) and Article VIII, §3 governing amendments of Article VII are reproduced as Appendix G at 111a, *infra*.

STATEMENT OF THE CASE

1. STATEMENT OF FACTS

In Spring 1997 the nine original Petitioners were students at the College of Staten Island ("CSI"), a public college operated by the City University of New York ("CUNY"). [JA/47-48, ¶¶11-15][1] Six of the Petitioners (the "Student Journalists") were editors or

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[1]"[JA/##]" and "[JA/##-##]" respectively refer to pages and ranges of pages in the Joint Appendix filed with the Second Circuit.

staff members of the *College Voice*, a newspaper and political journal funded by mandatory student activity fees paid by CSI students. *Id.* Five of the Student Journalists and two other Petitioners were members of a slate of candidates (the "Student Union" or "SU") running in the Spring 1997 election where CSI students elected members of the Student Government ("SG") and student representatives to serve on other college governance bodies. *Id.* The ninth Petitioner is a student who voted in that election who was not affiliated with the *College Voice* or the SU. *Id.*

The *College Voice* published a special election edition prominently endorsing the SU slate of candidates. 8a-9a The 28 page issue included a large headline on the front page stating "VOTE STUDENT UNION!," a full page editorial endorsing the SU, two pages of platform statements and biographical information about the SU candidates and a back page entirely devoted to the SU's twelve point program. *Id.* The issue also included articles on topics unrelated to the election. *Id.* The Student Journalists decided to have the election edition delivered to campus two days before the four day voting period began because they believed their endorsements would have maximum impact on potential voters at that time. *Id.*

Respondents include six members of the CSI Student Senate (the "Student Senators") including two senators who served as SG President and SG Publications Commissioner in Spring 1997. [JA/49-50, ¶¶22-23, 25] CUNY's Board of Trustees Bylaws (the "CUNY Bylaws") and CSI's Governance Plan delegate authority to allocate funding to and regulate student publications, including the *College Voice*, to the Student

Senate and the Senate's Publications Commission, subject to approval by committee of students, faculty members and administrators with the college president retaining the right to veto any allocations or expenditures of student activity fees. CUNY Bylaws 15.2[a] and [b]; 16.5[a]; 16.11[a] and [b] and CSI Governance Plan, Article VII, §4(e)(10), (11) and (12) and §6(b)[2]. 99a-101a, 105a, 108a-109a, 114a-115a, 116a-117a. In Spring 1997 five of the six Student Senators were running for reelection on a slate of candidates opposing the SU. [JA/49-50, ¶¶22-23, 25]

On the afternoon that the newspaper was scheduled to be delivered to campus (April 28) a representative of the printer informed the editors that the SG Publications Commissioner directed the printer to hold the newspaper at his shop for three weeks until the SG election was concluded. 9a The next morning (April 29) an attorney for the *College Voice* faxed a letter to Respondent CSI President Marlene Springer informing her that the newspaper had been impounded and urging Springer to order the newspaper's immediate release. 9a

Springer directed CSI Vice President Carol Jackson to ensure that the newspaper was released. 10a Jackson spoke with SG President Joseph Canale and

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[2] CUNY Bylaw 16.5 provides that allocations of student activity fees by SG are subject to approval by a thirteen member "college association" consisting of six elected students, four administrators and three faculty members. 105a-107a The seven non-student members are appointed by the college president who may veto allocations approved by the college association. CUNY Bylaws 16.5[b][1] and 16.11[a] and [b]. 105a-106a, 108a-109a

Publications Commissioner Juergen Schnetzer to urge them to release the newspaper, but Schnetzer refused to rescind his order and the newspaper remained impounded. *Id.* Later that day the Student Senate met in closed session and refused to overrule Schnetzer's impoundment order. *Id.*

Jackson subsequently informed Canale that President Springer was overriding the Senate's decision and college employees delivered the newspaper to the campus approximately 24 hours late. 10a

CUNY regulations require that each college president appoint a student election review committee (SERC) to certify results and hear complaints pertaining to student elections. 3a The college presidents make final determinations of any appeals of SERC decisions. *Id.* A candidate running against the SU filed an appeal alleging that the *College Voice* election edition was an improper use of student activity fees that gave an unfair advantage to the SU candidates. 10a-11a

On May 6, 1997, Springer issued a memorandum decision deciding the election appeals ("5/6/97 Mem.") stating in relevant part:

> The *College Voice* inappropriately used student activity fee funds to publish and distribute approximately five thousand copies of a twenty-eight page issue of the *College Voice* with a cover boldly encouraging a vote for a particular slate of candidates, some of whom are also staff members of the *College Voice*. Moreover, much of the issue was substantially devoted to

> supporting the endorsed slate of candidates. I find that this issue amounted to a thinly veiled student activity fee funded piece of campaign literature for the Student Union slate. As a result, the electoral process was compromised beyond its ability to be fair to all candidates, as argued by other candidates who requested nullification of the election.
>
> The April 30th to May 3rd election is therefore declared null and void, and a new election shall be scheduled for the period Thursday May 8th, 1997 through Friday, May 16, 1997.

12a

On May 7th the votes in the nullified election were publicly tallied revealing that the SU candidates won all 37 positions they contested by large margins. 14a, Although fewer students voted in the second election, all the candidates who would have won the first election were victorious in the second election. *Id.*

The following facts are undisputed by President Springer as set forth in Defendants' Response To Plaintiffs' Local Rule 56.1 Statement Of Undisputed Facts dated July 7, 2003 [235a-262a]:

24. CUNY and CSI have not placed any restrictions on subjects that may be covered in the *College Voice* or the *Banner*.[3]

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[3] The *Banner* is a student newspaper formed by students who disagreed with the editorial policies of the *College Voice* that is also funded by student activity fees. 5a [JA/70, ¶88]

25. The editors of the *College Voice* determine what articles and editorials will be published without any prior review or censorship.

26. The *College Voice* is not prohibited from publishing articles and editorials expressing opinions or endorsing candidates in student elections.

27. The *College Voice* and student newspapers at other CUNY colleges endorse candidates in Student Government elections.

* * * *

65. In Spring 1997 there were no regulations restricting the content of the *College Voice*.

66. In Spring 1997 there were no regulations restricting the viewpoints that could be published in the *College Voice*.

[citations omitted]. 244a-245a; 261a

2. PROCEEDINGS BELOW

a. *The Third Amended Complaint*

This lawsuit was commenced on May 27, 1997 in the Eastern District of New York. The Third Amended Complaint ("3d. Am. Cmp.") was filed on November 12, 1999 seeking preliminary and permanent injunctive relief, declaratory judgment and damages under 42 U.S.C. §1983 for violations of Petitioners' First and Fourteenth Amendment rights and for violation of the

New York State Open Meetings Law.

Defendants included President Springer; the SG President; the SG Publications Commissioner; and four other members of the Student Senate who, with the SG President, were present at the meeting where the Student Senate refused to overrule the impoundment of the *College Voice* by the Publications Commissioner.[4]

b. *Preliminary Injunction Proceedings*

The magistrate judge recommended that the district court grant Petitioners' motion to enjoin CSI from nullifying any subsequent student election or taking any other adverse action in response to endorsements or other viewpoints pertaining to a student election published in any student newspaper.[5] 17a and Appendix I at 122a-151a.

President Springer subsequently asserted by counsel that in issuing her 5/6/97 Mem. she relied on

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[4] Petitioners do not seek to appeal the dismissal of their claims against any of the defendants below other than the Respondents named herein.

Under the 3d Amd. Cmp. and a subsequent stipulation by the parties Petitioners' damage claims are limited to an aggregate of $500.00 for compensatory damages, $1.00 per defendant for punitive damages and $1.00 per defendant for nominal damages.

[5] The magistrate judge originally recommended that the injunction apply to all colleges operated by CUNY and subsequently modified her recommendation to a proposed preliminary injunction limited to CSI. 152a-154a

a student election rule ("Rule 2") which stated: "The campus newspaper may not be used as posters on walls, bulletin boards, etc. and may not be used as a means to distribute campaign flyers." 17a Springer further asserted by counsel that an injunction would be moot because Rule 2 had been repealed and as long as Springer served as CSI President, she would not nullify the results of any future student election in response to any material published in any student publication. *Id.* In an order dated March 23, 2000, the district court subsequently denied the motion for a preliminary injunction as moot despite Petitioners' arguments that Rule 2 on its face did not apply to content of student publications and if it did it was unconstitutionally vague because it provided no clear guidelines about what content pertaining to a student government election would be impermissible. *Id.* 155a-157a

c. *The District Court's First Decision On The Merits*

In an opinion dated March 28, 2002 (Appendix B at 58a, *infra*) the district court denied Petitioner's motion for partial summary judgment against Springer pending further discovery, dismissed claims for injunctive and declaratory relief as moot and dismissed claims against all the defendants except Springer and three other CSI administrative employees on various grounds.[6]

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[6] The district court subsequently dismissed claims against two of these defendants on the ground that while "they may have advised [Springer] on how to proceed, her decision was an

(continued...)

The claims against the Student Senators were dismissed on the ground that the student government officers were not state actors. 70a-76a The district court also held that Petitioners stated a valid cause of action under the First Amendment against President Springer and three other remaining CSI employees and that the Petitioners who sued as candidates and voters, as well as the student journalists, had standing to sue as participants in a limited public forum funded by mandatory student activity fees.[7] 61a, 70a

Petitioners moved for reconsideration of their summary judgment motion asserting that the district court had not considered Petitioners' arguments that even if the nullification of the student election was not based on viewpoint discrimination, President Springer's decision regulated content of the *College Voice* in a manner that was unconstitutionally vague and

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[6](...continued)
intervening step between any actions on their part and the resulting harm to plaintiffs." 92a. The claims against the third defendant were dismissed upon stipulation by the parties. 78a, n.1

[7] The Ninth Circuit has since held that a student government election at a public college constitutes a limited public forum in which student voters and candidates participate. *Flint v. Dennison*, 488 F.3d 816, 832-833 (9th Cir. 2007). The Seventh Circuit previously held that "students have a First Amendment interest in assuring that the University administers the mandatory fee system in manner ensuring viewpoint neutrality" and have standing to make facial challenges to university regulations that give student government officers unbridled discretion over the allocation of student activity fees. *Southworth v. Board of Regents ("Southworth II")*, 307 F.3d 566, 574, 580-581 (7th Cir. 2002).

overbroad. The motion for reconsideration was denied. 233a-234a

d. *The District Court's Second Decision On The Merits*

President Springer was subsequently deposed and testified that in addition to student election Rule 2, *supra*, she also relied on another student election rule ("Rule 5") when she nullified the student election. 82a. Rule 5 stated: "The Student Government will be glad to make you 30 copies of your stamped and approved poster or flyer. All candidates must remove their election materials from the designated areas after the election is over." *Id.*

The Second Circuit and the district court both cited and discussed extensive portions of President Springer's deposition testimony pertaining to her standard for reviewing the election-related content a student newspaper and her application of the election rules for that purpose. 31a-33a; 82a-84a

Petitioners and the remaining defendants filed motions for summary judgment. In a decision entered September 2, 2004 the district court rejected President Springer's reliance on the election rules holding that "no reasonable jury could conclude that the Rules are directed at the editorial content of the campus newspapers" and that "President Springer's actions resulted in a denial of plaintiffs' First Amendment right to be free from reprisals based upon the content of the articles that were published in the *College Voice*." 77a, 86a, 92a. Despite finding that Springer violated clearly established First Amendment rights

by imposing a viewpoint based restriction on speech in a limited public forum, the district court held that she was entitled to qualified immunity because "it was not established with sufficient specificity that canceling a student government election . . . would constitute an actionable form of reprisal against" a college newspaper. 93a

Petitioners appealed.

e. *The Second Circuit's Decision*

In a majority decision entered on July 13, 2007, the Second Circuit vacated the district court's decision to grant qualified immunity to President Springer citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) for the proposition that if the contours of a right are established with sufficient clarity, a reasonable official "can still be on notice that their conduct violates established law even in novel factual circumstances." 45a With respect to Springer's decision the Second Circuit concluded "although no court had specifically held at the time that the *nullification of an election* on the basis of views expressed by a student newspaper violated the First Amendment where such nullification chilled future speech, the unlawfulness of Springer's actions was apparent in the light of pre-existing law." 45a [Original emphasis, citations and internal quotations omitted.]

The Second Circuit rejected President Springer's claim that she reasonably relied on CSI's student election rules adopting the district court's conclusion that:

> The only Rules that President Springer relied on and that defendants say are relevant, Election Rules 2 and 5, define the responsibility of the individual student candidates, not the scope of the content of the college newspapers. . . . The Rules do not, explicitly or even implicitly, preclude campus newspapers from endorsing candidates or running platform statements. There is nothing in the rules concerning "balanced" coverage, the "context" of editorials, or the placement of headlines or platform statements. Indeed, implicit in Rule 2's requirement that candidates should not use the newspapers as posters is the acknowledgment that the papers may contain favorable opinions and support for a candidate that he or she would *want* to post on a bulletin board. That Rule 5 provides that the student government will print and pay for 30 posters or flyers imposes no restriction on the number of issues of the school newspaper which may contain an endorsement. *There are simply no written guidelines to establish that what was printed in the May 1997 issue of the* College Voice *was prohibited.*

39a-40a [Emphasis on last sentence added by the Second Circuit].

Despite holding election Rules 2 and 5 were facially inapplicable to the content of student newspapers and provided no clear guidelines to establish what content would be impermissible, the Second Circuit denied Petitioners' motion for summary

judgment and instead remanded the case for trial to determine whether President Springer actually relied on the election rules and, if she did, whether her reliance on the rules was reasonable. 49a

REASONS TO GRANT THE PETITION

The Second Circuit misconstrued the basic principle that the imposition of mandatory student activity fee by a public college dedicated in whole or in part to expressive student activities creates a "metaphysical" limited public forum encompassing the entire range of expressive activities funded by the fee. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829-830, 840 (1995). Instead, the court below erroneously held that the student newspaper was itself a public forum, rather than one of the expressive activities that collectively comprised the limited public forum recognized by this Court. 28a, n.13; 29a-30a

Consequently, the Second Circuit failed to appreciate that the Student Senators were engaged in state action as regulators of the student activity fee funded public forum when the Student Senators acted in their official capacities to impound a special election edition of a student newspaper to prevent dissemination of the newspaper's endorsements of candidates in a student election.

The Second Circuit erroneously concluded that the Student Senators were not state actors because the college president exercised her authority to overrule the senators' self-executing impoundment order 24 hours after the newspaper was embargoed during the

height of the student election campaign. 51a, n.16 The foregoing decision is inconsistent with the long established principle distinguishing individual liability from agency liability under 42 U.S.C. § 1983 when individuals holding official positions act under color of law in violation of public policy as set forth by the Court in *Monroe v. Pape*, 365 U.S. 167, 171-172 (1961) and many other cases.

The Second Circuit's recent decision conflicts with the Eighth Circuit and all the other federal and state courts that have held in decisions going back over 25 years, that student government officers are engaged in state action when they regulate expressive student activities funded by student activity fees at public colleges. 19-23, *infra*.

Censorship and viewpoint based restrictions imposed on student speech by student government officials is a recurring problem that has been reported at many of the nation's pubic colleges where student governments have authority over allocating student activity fees and regulating recipients of those funds. The Second Circuit's recent departure from prior cases is therefore a particularly serious threat to the exercise of the First Amendment rights of students paying student activity fees at public colleges that have been recognized as vitally important by this Court. *Rosenberger, supra*, 515 U.S. at 835-836. 23, *infra* and Appendix H, *infra*.

Unless reversed the decision below will set a dangerous precedent shielding officials not entitled to qualified immunity from personal liability for imposing viewpoint based restrictions in public forums if

the official claims to have relied on a vague regulation giving the official unbridled discretion to ban or penalize protected speech based on viewpoints.

The decision below departs from this Court's long-standing precedents holding that vague regulations that impact on First Amendment expression are unenforceable and breaks with the unanimous consensus of six circuit courts that have concluded that officials may not exercise unbridled discretion when regulating expressive activities in limited public forums.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH *ROSENBERGER v. RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA*

A. The Second Circuit Misconstrued Controlling Case Law Recognizing That Imposition Of A Mandatory Student Activity Fee By A Public College Creates A Metaphysical Public Forum Encompassing Multiple Channels Of Expressive Activity

The guiding principles governing the First Amendment rights of students participating in expressive activities funded by mandatory student activity fees at public colleges were set forth in *Rosenberger, supra*, and *Board of Regents v. Southworth ("Southworth I")*, 529 U.S. 217 (2000). The assessment of a student activity fee dedicated in whole or in part to supporting

expressive student activities creates a "metaphysical" public forum in which student activity fee funded publications and other extracurricular activities serve as channels or vehicles for private speech by students. *Rosenberger*, 515 U.S. at 829-830, 840.

The court below fundamentally misconstrued this principle when it held that the relevant public forum was the student newspaper, not the metaphysical forum comprised of all the student publications and other expressive activities supported by the student activity fees paid by CSI students.[8] 28a-30a. Consequently, the Second Circuit failed to appreciate that when the SG Publications Commissioner and the other Student Senators ordered the student newspaper impounded to suppress its viewpoint, they were acting under color of law as regulators of the metaphysical public forum which included the student newspaper and all the other publications and expressive activities subsidized by student activity fees. The Student Senators were abusing power and responsibility granted to the CSI student government by the university bylaws and the college governance charter.

Rosenberger enunciated the nature and scope of the limited public forum created when a public college establishes a mandatory student activity fee reserved in whole or in part for expressive student free speech activities:

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[8] The Second Circuit held "we have no doubt that the *College Voice* constituted a 'limited public forum' and thus reject the arguments proffered by plaintiffs and amicus Student Press Law Center to the contrary. 28a, n.13

> The [Student Activity Fund] is a forum more in a metaphysical sense than in a spatial or geographic sense, but the same principles are applicable. . . .
>
> * * * *
>
> The object of the [Student Activity Fund] is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life.

Rosenberger, *supra*, 515 U.S. at 830, 840.

The court below failed to appreciate the essential nature of the metaphysical public forum recognized in *Rosenberger* when it held that the relevant forum was the student newspaper itself:

> [CSI] intended to open the pages of the *College Voice* to "indiscriminate use" by the students who serve as its contributors and editors, and . . . it thereby created a public forum in which the only limit involved the nature of permissible speakers.

30a.

The *College Voice* is not a public forum. The *College Voice* is a student-activity fee funded vehicle for private speech of its editors and contributors existing within a metaphysical public forum where student publications and other student activity fee funded activities are channels for expression by CSI students. *See*, *Rosenberger*, *supra*, 515 U.S. at 829-

830, 834. Indeed, if the *College Voice* was a public forum open to "indiscriminate use" by its "contributors and editors" the editors would have to employ strictly viewpoint neutral criteria for accepting or rejecting submissions by editors or contributors.[9]

B. The Decision Below Conflicts With The Eighth Circuit And All Other Federal And State Courts That Have Held That Student Governments At Public Colleges Engage In State Action When They Regulate Expressive Student Activities

The Second Circuit's holding that officers of public college student government are not engaged in state action when they act in their official capacities to violate the constitutional rights of their fellow students directly conflicts with every other published opinion of federal and state courts known to have addressed that issue, including the Eighth Circuit in *Gay and Lesbian Students Ass'n. v. Gohn*, 850 F.2d 361, 365-366 (8th Cir. 1988) (the action of a student government constituted state action because it could be reversed by the university and was therefore "not free from university control"). Without citing *Gohn* the court below concluded that the characterization of the decisions of the SG Publications Commissioner and the other Student Senators that resulted in the impoundment of the student newspaper for 24 hours during the height of the student election campaign as

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[9] Some students who disagreed with the viewpoints published in the *College Voice* formed their own newspaper and received student activity fee funding. 6a

state action is "belied in this case given President Springer's unilateral decision to overrule the SERC's order impounding the *College Voice*."[10] 51a, n.16.

The court below misconstrued and misapplied the fundamental concept of individual liability of public officials acting under color of law set forth in the plain language of 42 U.S.C. § 1983 and enunciated in *Monroe v. Pape, supra*, 365 U.S. at 171-172 ("There can be no doubt at least since *Ex parte Virginia*, 100 U.S. 339, 346-347 [1880], that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it"). *Accord*, *Zinermon v. Burch*, 494 U.S. 113, 124 (1990) ("[i]n *Monroe*, this Court rejected the view that § 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the State's common law").

While President Springer's decision to overrule the Student Senate would be a defense to agency liability under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), her authority to override the SG Publication Commissioner's impoundment order actually establishes that the Publications Commissioner and the Student Senate were engaged in state action because they exercised power traditionally

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[10] The order to impound the *College Voice* was actually issued by the SG Publications Commissioner and upheld by the Student Senate, not the SERC. 9a-10a

reserved to public colleges to regulate a limited public forum supported by mandatory student activities. *Gohn, supra*, 850 F.2d at 364-365.

Although the college retained the final authority to overrule decisions by the student government, the Publication Commissioner's impoundment order was self-executing and resulted in the suppression of the election issue of the newspaper for 24 hours during the critical period in the student election campaign before the balloting began. 8a-10a. *See, Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[l]oss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury").

Ironically, the Second Circuit itself recently affirmed a decision by a district court which held that a state college student government and its president were state actors. *Amidon v. Student Association of the State University of New York at Albany*, 399 F. Supp. 2d 136, 145 (N.D.N.Y. 2005) ("*Amidon I*"), *aff'd* 2007 U.S. App. LEXIS 26787 (2d Cir. Nov. 20, 2007)("*Amidon II*"). *See also, Alabama Student Party v. Student Government Association*, 867 F.2d 1344, 1345-1346 (11th Cir. 1989) ("the SGA [Student Government Association] was a state actor subject to the same constitutional restrictions as the University itself"). The Defendants in *Amidon* and *Alabama Student Party* did not raise the state action defense on appeal after litigating the question in the district courts.

At least two other district courts in the Second Circuit previously held that public college student governments and their officers are state actors under

42 U.S.C. §1983. *College Standard Magazine v. State University of New York*, 03-CV-505, Tr. Bench Decisions (N.D.N.Y. June 9, 2003 ["*College Standard I*"], August 5, 2005 ["*College Standard II*"]) (McAvoy, J.) (cited in *Amidon I, supra*, 399 F. Supp. 2d at 144-145 and 144 n.6); *Sellman v. Baruch College of the City University of New York*, 482 F. Supp. 475, 478-479 (S.D.N.Y. 1979) (Weinfeld, J.).

The cogent reasoning of the late Judge Edward Weinfeld when he concluded that the student government at another CUNY college was a state actor is equally valid in analyzing the role of SG in governance at CSI:

> Although the student government enjoys a measure of autonomy, nevertheless it is a creature of governmental agencies. Its branches are advised and guided by faculty members; its constitution is required to be compatible with guidelines fostered by the Board of Higher Education; the Dean of Students, a government employee, is the final arbiter of election disputes. The student government receives money, both to cover its operating expenses and to fund the activities it supervises, from mandatory student fees collected by the College from the entire student body. Finally, its meetings are held on campus during hours specifically set aside by the College for student activities; thus, it may be presumed that both the College and the students derive benefit from this interlocking relationship. Although none of these factors, standing alone, would constitute the requisite degree of state involvement, in combination, they do. The plaintiff has met the threshold

> requirement. The state is sufficiently involved in the governance and control of Baruch College that the actions of its student government may be attributed to the state itself; the policies of the student government are held to the same constitutional standards as those that apply to the state. [Footnotes omitted].

In a bench decision Judge McAvoy in the Northern District of New York granted summary judgment to plaintiffs after holding that the unwritten funding policies of a state college student government gave student government officials unbridled discretion when they cut funding to a conservative student magazine. *College Standard I,* (03-CV-505, N.D.N.Y. August 5, 2005) [cited in *Amidon I, supra* 399 F. Supp. 2d at 144 n.6]

The Supreme Court of Colorado held that the decision of a community college student senate to cut funding to a school newspaper was state action under 42 U.S. §1983. *State Board For Comm. Colleges v. Olson*, 629 P.2d 429, 433 n.4 (Colo. 1984) *subsequent proceeding sub nom, Olson v. State Board*, 759 P.2d 829 (Colo. 1988)

C. Censorship And Other Violations Of Students' First Amendment Rights By College Student Governments Is A Recurring Problem That Merits This Court's Review

Despite the judicial consensus prior to the decision below that public college student government officials are state actors when they regulate student publications, censorship and the imposition of other

viewpoint based restrictions on student publications by student governments remains a recurring problem at public colleges where student governments allocate student activity fees and regulate student expressive activities. *See* Student Press Law Center *Censorship By Student Governments* in LAW OF THE STUDENT PRESS, 2D ED. 58 (Student Press Law Center, Arlington, Va., 1994). Appendix H provides a list of instances reported by the Student Press Law Center in recent years where student journalists at public colleges alleged violations of their First Amendment rights by college student governments. *Infra*, at 119a.

The decision below gives judicial imprimatur to abuses of authority by student governments regulating limited public forums funded by student activity fees thereby jeopardizing the rights of public college students who participate as speakers or listeners in expressive activities in those forums.

D. CSI And CUNY Granted The Student Government The Right And Responsibility To Regulate First Amendment Activities In A Metaphysical Limited Public Forum

Like many public universities and colleges, CUNY and CSI instituted a governance structure that established a student government to charter and regulate student activity fee funded extracurricular activities and publications subject to the authority, bylaws, regulations and governance procedures of

CUNY and CSI.[11] The CUNY Bylaws and the CSI Governance Plan created the CSI Student Government and empowered SG to administer the student activity fee funded public forum by delegating to SG authority: (i) to *charter* student publications and other extracurricular activities funded by student activity fees; (ii) to *allocate* student activity fees to publications and other extracurricular activities; (iii) to *regulate* student publications and other extracurricular activities either directly or by delegating the regulatory authority to a component of SG, like the Publications Commission, subject to review by SG and, (iv) to *suspend* or *revoke* any charter of a student publication or extracurricular activity. CUNY Bylaw 15.2[a] and [b]; Governance Plan, Article VII, §4(e)(10) and (11). 99a-101a, 114a

CUNY derives its power to assess student activity fees from §6206[7][a] of New York's Education Law ("EDUC") which sets forth the powers of the CUNY Board of Trustees (the "CUNY Board") and states in relevant part "the board of trustees may impose and collect fees and charges for student government and other student activities and receive and expend them as agent or trustee." Power granted to the CUNY Board of Trustees under EDUC §6206[7][a] has been held to be non-delegable. *See, Faculty v. Murphy*, 149 A.D.2d 315, 316, 539 N.Y.S.2d 367, 369 (1st Dep't 1989) (power granted to the CUNY trustees under

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[11] *See*, CUNY Board of Trustees Bylaws ("CUNY Bylaws") §§15.1; 15.2; 16.1 through 16.8; 16.11[a] and [b] and 16.12 [Appendix F, *infra*, at 99a-110a] and CSI Governance Plan, Art. VII, §§(4)(e)(10), (11) and (12) and §6 [Appendix G, *infra*, at 114a-115a and 116a-117a].

§6206[7] to grant or deny tenure is non-delegable) citing *Cohoes City School Dist. v. Cohoes Teachers Assn.*, 40 N.Y.2d 774, 777, 358 N.E.2d 878, 880 (1976).[12] *See also, Southworth II, supra*, 307 F.3d at 581 (college student government regulations for allocating student activity fees must be viewpoint neutral).

New York State's highest court concluded that the student activity fee assessed by colleges operated by CUNY "resembles those examined in [citation omitted] and *Rosenberger*," and recognized that the powers to allocate student activity fees and to regulate the publication of a student newspaper funded by such fees are "momentous" powers of the state. *Smith v. City University*, 92 N.Y.2d 707, 714-716, 708 N.E.2d 983, 986-987 (1999).[13]

The role of a college student government regulating the metaphysical limited public forum created by a public college's student activity fee was discussed by the district court in *Amidon I, supra*:

> On the facts of this case, the SA clearly acts in concert with the state to create a forum for the exercise of First Amendment rights.

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[12] In 1995 former EDUC §6206[7] was redesignated §6206[7][a] by an amendment that added a new subsection [b]. New York Laws 1995 c.344 §1.

[13] The *Smith v. City University* case concerned a "college association" operating under CUNY Bylaw 16.5 that suspended publication of a student newspaper that published a controversial article. *Smith, supra*, 92 N.Y.2d at 711, 708 N.E.2d at 984.

> The SA determines the amount of the fee. The state collects it, enforces its payment, and turns it over to the SA. The SA distributes the money pursuant to state regulation and approval. The SA is intertwined with the state in collecting, budgeting, and allocating funds to create a forum for speech, and therefore, the SA acts under the color of state law. [Internal citations omitted].

Amidon I, supra, 399 F. Supp. 2d at 145, *aff'd* 2007 U.S. App. LEXIS 26787.

The Student Association held a state actor in *Amidon I* was "self-created and governed by its own elected representatives." *Id.* However, the involvement of the state in creating, regulating and supervising SG makes SG even more inextricably linked and subordinate to CUNY than the SA was to the state university. The SG was not "self-created", it was created by the CSI Governance Plan and the SG Constitution was approved by the CUNY Board of Trustees as Article VII of the Governance Plan. 118a Article VIII, §3 of the Governance Plan requires any amendment of the SG constitution to be ratified by the CUNY Board. *Id.* The amount of the student activity fees paid by CSI students is set by the CUNY Board, not the SG, and student referenda recommending change in the amount of the fee are advisory to the Board. CUNY Bylaw 16.12[b]. 109a The fees must be held in a central college depository, allocated only for eleven purposes specified by the CUNY Bylaws and subject to procedures specified by CUNY. CUNY Bylaws 16.1, 16.2 and 16.8. 102a-103a, 108a SG's allocations of student activity fees must be approved by a "college

association" where the college president appoints a majority of the members and retains the right to veto such allocations or expenditures. CUNY Bylaws 16.5 and 16.11[a] and [b]. 105a, 108a

CUNY Bylaw 15.2[a] and [b] delegates to student governments power to charter, regulate and discipline student publications and extracurricular organizations. 99a-101a However, although some of SG's regulatory powers are self-executing, President Springer's authority to overrule SG's impoundment order demonstrates that CUNY, as it must, pursuant to EDUC §6206[7][a] and the university's obligation to maintain viewpoint neutrality in the limited public forum (*see, Southworth II, supra*), retains ultimate authority over the regulation of the metaphysical public forum funded by student activity fees.

E. The Second Circuit Misconstrued And Misapplied Cases Finding No State Action Where The Government Had No Control Over Private Parties Or A Public Corporation

The court below's failure to appreciate the different roles of speakers and regulators in a limited public forum was apparent when the court below erroneously cited *Leeds v. Meltz*, 85 F.3d 51, 55 (2d Cir. 1996), a case where the Second Circuit correctly held that editors of a student activity fee funded newspaper at CUNY's Law School did not engage in state action when they rejected advertisements based on the advertiser's viewpoint. Like the Student Journalists in this case, the editors of the Law School newspaper were speakers, not regulators, of the public forum. *Id.*

As demonstrated by President Springer's decision to override the Student Senate, CUNY (as it must) retains the ultimate authority over the allocation and regulation of CSI's metaphysical public forum funded by student activity fees.

However, every case cited by the court below at 50a to 51a (including n.16) involved instances where the courts found that private entities or a public corporation did not engage in state action ***because the government had no power to compel or override the challenged action.*** *See, e.g., San Francisco Arts & Ath. v. United States Olympic Comm.*, 483 U.S. 522, 547 (1987) (although Congress gave a public corporation exclusive rights over use of the word "Olympic", the government could not compel or prohibit the corporation from authorizing or forbidding the use of the word by the plaintiff); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (public funding of a private school did not make school officials state actors); *Blum v. Yaretsky*, 457 U.S. 991, 1008, 1012 (1982) (decisions by nursing homes to transfer patients to lower levels of care was not state action because "[t]hose decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the state"); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353-355 (1974) (termination of electric service by a regulated private utility company was not state action because the provision of electricity was not an obligation of the state and perfunctory approval of termination procedures by a state regulatory board was not sufficient state involvement to establish the providing of electrical service as a government function); *Loce v. Time Warner Entertainment Advance/Newhouse*, 191 F.3d

256, 266 (2d Cir. 1999) (no state action where federal law permitted, but did not compel, private company leasing cable access channels to enact decency guidelines and to exclude programming the company deemed indecent).

The SG is not a regulated private business or a public corporation with independent freedom of action. The SG is an elected body, created by CSI and CUNY, and endowed by them with powers of a substantive nature and authority to regulate expressive activity by recipients of student activity fees at CSI. When the Student Senators impounded the *College Voice* they were acting under color of law and their self-executing action, despite ultimately being reversed by CUNY, was a prior restraint on the student newspaper that prevented its delivery for 24 hours during a critical period before the student election campaign.

II. REVIEW IS WARRANTED BECAUSE THE SECOND CIRCUIT HELD THAT A PUBLIC OFFICIAL WHO IS NOT ENTITLED TO QUALIFIED IMMUNITY MAY NONETHELESS REASONABLY RELY ON FACIALLY VAGUE REGULATIONS TO EXERCISE UNBRIDLED DISCRETION TO JUDGE CONTENT OF PROTECTED SPEECH IN A LIMITED PUBLIC FORUM AND TO RESTRICT SUCH SPEECH BASED ON ITS VIEWPOINT

A. The Courts Below Held That Election Rules 2 and 5 Established No Standards for the Content Of Student Newspapers

It would be hard to imagine regulations more inapposite for judging the content of a student newspaper than Rules 2 and 5 that President Springer claims to have relied on when she determined that the May 1997 edition of the *College Voice* "was a thinly veiled student activity fee funded piece of campaign literature."[14] 12a

The district court and the Second Circuit both held that Rules 2 and 5 pertained exclusively to speech by student candidates and were facially inapplicable to content of student newspapers. The district court concluded "[a]s no reasonable jury could conclude that the Rules are directed at the editorial content of the campus newspapers, that argument is rejected." 86a The Second Circuit declared "[w]e agree entirely with the district court's reading of the rules and therefore reject defendants' arguments that Springer's actions were no more than the content-neutral enforcement of the election regulations adopted by the SERC." 40a

The Second Circuit and the district court recognized that Rules 2 and 5 set no standards for determining what editorial content pertaining to student elections would be deemed improper by President Springer and trigger further reprisals. 39a-40a

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[14] Rules 2 and 5 stated:

2. The campus newspapers may not be used as posters on walls, bulletin boards, etc., and may not be used as a means to distribute campaign flyers. 82a

5. The Student Government will be glad to make you 30 copies of your stamped and approved poster or flyer. All candidates must remove their election materials from the designated areas after the election is over. 82a

President Springer testified that the *College Voice* had an obligation to present "balanced" coverage of the student election which she described as "presenting both slates." 31a-33a She construed the election Rules as prohibiting the kind of prominent endorsements published in the May 1997 edition of the *College Voice*:

> Q: . . . Is the decision to publish an opinion on the front page with a big headline as opposed to on a back -- on page 10 with a small headline, is that decision fundamentally reflecting an opinion about how important the story is?
>
> A: I think in journalist practices it would be in that sense. But is it the editor's right to do that under these particular situations where we have regulations governing the campaign literature, no.

33a

However, the district court noted that when President Springer was shown a copy of an edition of the *College Voice* containing candidate endorsements in a subsequent student election she testified that she could not determine whether the content of that issue was appropriate or whether it fulfilled her criteria for "balance" and "presenting both sides" without having an opportunity to review the entire election and the "context." 83a-84a

The court below noted that President Springer's decision to nullify the results of the Spring 1997 student election in response to the zealous endorsements in the *College Voice* predictably caused the

Student Journalists to reduce the prominence of their endorsements in future student elections as Student Journalists and candidates worried whether endorsement by the *College Voice* would be the "kiss of death" for candidates the newspaper supported. 14a-15a

Even assuming Rules 2 and 5 could possibly apply to the content of student newspapers, they provided no clear standards for student editors to determine what conduct was prohibited under the rules. Accordingly, once the Second Circuit correctly upheld the district court's finding on the facial inapplicability of the Rules, including the district court's ruling that "no reasonable jury could conclude that the Rules are directed at the editorial content of the campus newspapers," there remained no question of fact for a jury to decide regarding President Springer's liability. 40a, 86a

B. President Springer's 5/6/97 Mem. Violated CUNY's Written Policy Against Reprisals In Response to the Content Of Student Newspapers

President Springer's decision to nullify the student election violated the university's written policy prohibiting content based reprisals against student publications. Accordingly, this is a case where injunctive remedies may be insufficient because Springer may have been acting under color of law as an individual in violation of university policy.

In 1995, over two years before President Springer nullified the CSI student election, CUNY's Vice Chancellor for Legal Affairs sent a memorandum to

the presidents of CUNY's colleges, including President Springer, advising the Presidents to refrain from taking adverse action against students in response to opinions published in student newspapers. 5a, n.2 The 1995 memo recognized that this Court had held that "'the campus of a public university, at least for its students, possesses many characteristics of a public forum.'" Citing *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). [JA/528-529; *see generally*, JA/528-537] *Cf.* 44a (the court below erroneously stated that the policy memorandum recognized the student publications themselves as public forums). The memorandum also stated that "a public university may not take adverse action against a student newspaper . . . or against a particular student because it disagrees with the content of a student newspaper." 5a, n.2 [JA/533]

Springer testified that she reviewed the Vice Chancellor's memorandum before issuing her 5/6/97 Mem. [JA/450]. A year prior to the 1997 CSI student election the Second Circuit also reviewed the Vice Chancellor's 1995 memorandum and concluded that CUNY "expressly disclaim[s] any right of the institution to control student publications, such as those financed through student activity fees." *Leeds, supra*, 85 F.3d at 54. However, Springer's 5/6/97 Mem. stands in direct contradiction to the policy set forth by the 1995 memorandum by CUNY's Vice Chancellor for Legal Affairs.

If not reversed, the Second Circuit's decision will stand as a precedent allowing officials who rely on unconstitutional rules or regulations to escape liability by relying on implausible interpretations of irrelevant

regulations to justify viewpoint discrimination.

Although the Second Circuit's decision does not limit the scope of injunctive relief available, there are many instances where claims for nominal damages against public officers are the only way to adjudicate important constitutional issues. This is often the case when college students' claims for injunctive relief become moot or when the students lose standing upon graduating.

For this reason this Court has recognized that nominal damage awards against public officials sued in their individual capacities are sometimes the only way to adjudicate important constitutional questions. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 266-267 (1978) (student suspended without opportunity to respond to charges entitled to nominal damages). *See, also, Morrison v. Bd. of Educ.*, 507 F.3d 494, 2007 U.S.App. LEXIS 25133, *1, *12-*13 (6th Cir. 2007) (high school student's First Amendment claim for nominal damages could proceed after injunctive claims became moot when school district revised its rules).

C. This Court's Precedents Prohibit Vague Regulations Granting Officials Unbridled Discretion To Judge Speech In Traditional Public Forums

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.'" *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999), citing *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966),

See also, Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

The due process considerations underlying the vagueness doctrine are heightened when a law or regulation impacts on the First Amendment. *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976) ("stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser"), citing *Smith v. California*, 361 U.S. 147, 151 (1959). *See also Buckley v. Valeo*, 424 U.S. 1, 76-82 (1976); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-612 (1973).

The chilling effect of vague ordinances impacting on First Amendment liberties can cause citizens to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked," restricting their conduct "to that which is unquestionably safe. Free speech may not be so inhibited." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) [citations and internal quotes omitted].

Mindful of the chilling effect of vague regulations on First Amendment speech, this Court has consistently held that regulations governing access to traditional public forums must be viewpoint neutral and may not grant officials unbridled discretion in regulating such forums. *Morales, supra,* 527 U.S. at 56 (rally in a public park); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (public rally); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-770 (1988) (newsracks on public streets); *Shuttlesworth v.*

Birmingham, 394 U.S. 147, 150-151 (1969) (parade permit). As set forth, *infra*, at 37-39, the circuit courts that have reached the issue have held that the requirement of viewpoint neutrality necessarily implies a prohibition on officials exercising unbridled discretion as President Springer did when she construed Rules 2 and 5 as justifying a review of viewpoints that was strictly forbidden by CUNY's own policy, as well as this Court's decisions.

D. Viewpoint Neutrality Requires That Regulators Be Prohibited From Exercising Unbridled Discretion To Penalize Or Ban Expressive Speech In Limited Public Forums

This Court has not explicitly held that the unbridled discretion standard applies in limited public forums such as the metaphysical public forum funded by student activity fees at CSI. However the Court's decisions unequivocally prohibit viewpoint discrimination in any public or nonpublic forum. *Good News Club v. Milford Central School*, 533 U.S. 98, 106-107 (2001); *Cornelius v. NAACP Legal Defense*, 473 U.S. 788, 806 (1985).[15]

In a case where plaintiffs claimed that regulations governing the allocation of student activity fees gave a student government at a public college unbridled discretion to discriminate against disfavored viewpoints the Seventh Circuit concluded "the same concerns justifying the unbridled discretion standard

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[15] Since the forum in this case is a limited public forum it is not necessary for the Court to decide whether the unbridled discretion standard applies to nonpublic forums.

in physical forum cases exist in the metaphysical sphere (and because the Supreme Court directed us to the principles set forth in physical forum cases), the unbridled discretion standard appropriately applies to the University's mandatory fee system, whether we consider it a component of viewpoint neutrality or a separate constitutional requirement." *Southworth II, supra*, 307 F.3d at 580. [Original parentheses]

In reaching its conclusion the Seventh Circuit held that the risks of officials using unbridled discretion in allocating student activity fees were the same as the risks posed in this Court's cases that prohibit the exercise of unbridled discretion in the regulation of traditional public forums:

> [W]hen a decisionmaker has unbridled discretion there are two risks: First, the risk of self-censorship, where the plaintiff may edit his own viewpoint or the content of his speech to avoid governmental censorship; and second, the risk that the decisionmaker will use its unduly broad discretion to favor or disfavor speech based on its viewpoint or content, . . .

Southworth II, supra, 307 F.3d at 578-579.

The chilling effect recognized in *Southworth II* was apparent in this case where the Student Journalists had no way of knowing what content would trigger future viewpoint based reprisals by President Springer and therefore reduced the prominence of their election coverage while the Student Journalists and candidates worried that endorsement by the *College Voice* could be a "kiss of death" for the en-

dorsed candidates. 14a

Ironically, several weeks ago the Second Circuit became the most recent addition to the six circuit courts that have concluded the requirement of viewpoint neutrality in limited public forums necessarily requires prohibits the exercise of unbridled discretion. *Amidon II, supra*, 2007 U.S. App. LEXIS 26787, at *24 ("the Seventh Circuit's decision in [*Southworth II*] illustrates the appropriateness of such a rule [incorporating the unbridled discretion standard into the limited public forum paradigm]"). *See, also*, *Child Evangelism Fellowship v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1068 (4th Cir. 2006) (fee waiver policy for meetings on school property); *Child Evangelism of Maryland v. Montgomery County Public Schools*, 457 F.3d 376, 386 (4th Cir. 2006) (access to take home flyer forum); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-573 (7th Cir. 2001) (village hall meetings policy); *Lewis v. Wilson*, 253 F.3d 1077, 1079, 1080 (8th Cir. 2001) (vanity license plates); *Summum v. Callaghan*, 130 F.3d 906, 916, 919-920 (10th Cir. 1997)(courthouse lawn); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1199 (11th Cir. 1991) (newsracks at highway rest areas).

By holding that a public college president in 1997 could have reasonably interpreted Rules 2 and 5 to justify blatant viewpoint discrimination against a student newspaper, the decision below contradicts the logic of this Court's opinions prohibiting the exercise of unbridled discretion in traditional public forums as well as the weight of authority of the six circuits that have all concluded that the prohibition on unbridled discretion extends to limited public forums.

CONCLUSION

This Court has long recognized "vital First Amendment speech principles" at stake in preserving freedom of discourse in limited public forums funded by student activity fees assessed at state colleges and universities. *Rosenberger, supra*, 515 U.S. at 835-836:

> The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.

Rosenberger, supra, 515 U.S. at 835-836. Citing *Healy v. James*, 408 U.S. 169, 180-181 (1972); *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Rosenberger clearly recognized the right of students like the Petitioners to participate in expressive activities in forums funded by student activity fees free of viewpoint based restrictions or reprisals. The Second Circuit's decision would seriously compromise the rights of Petitioners and similarly situated students by permitting unconstitutional viewpoint restrictions to be imposed by college officials relying

on frivolous interpretations of vague rules and by shielding officers of student government from liability for deliberate viewpoint based prior restraint.

For the foregoing reasons this Petition for a Writ Of Certiorari to the Second Circuit should be granted.

Respectfully Submitted,

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December 10, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Second Circuit Docket No. 04-5250-cv
August Term, 2006
Argued: February 14, 2007
Decided: July 13, 2007

494 F.3d 108 (2d Cir. 2007)

SARAH HUSAIN, *et al.*,
Plaintiffs-Appellants,

-v.-

MARLENE SPRINGER, *et al.*,
Defendants-Appellees.

Appeal from judgments of the United States District Court for the Eastern District of New York (Gershon, J.) reported at 336 F. Supp. 2d 207 (E.D.N.Y. 2004) and 193 F. Supp. 2d 664 (E.D.N.Y. 2002) dismissing certain defendants and granting the remaining defendant summary judgment. E.D.N.Y. Docket No. CV-97-2982 (NG)(CLP)

B e f o r e:

DENNIS JACOBS, *Chief Judge,*
JOHN WALKER and GUIDO CALABRESI, *Circuit Judges.*

Affirmed in part, vacated and remanded in part.

Chief Judge Jacobs concurs and dissents in part in a separate opinion, *infra* at 53a.

CALABRESI, *Circuit Judge*:

In this appeal, we consider whether a public college president's decision to cancel a student government election because of content published in a school newspaper violates the First Amendment rights of the student journalists who produce that publication. We conclude that, in the circumstances presented in this case, the school administrator's actions did violate the First Amendment. Because factual issues exist with respect to the question of whether the college president is entitled to qualified immunity, we hold that it was inappropriate for the district court to grant summary judgment to the defendants. Accordingly, we vacate the district court's judgment with respect to the college president and remand the case for further proceedings.

BACKGROUND

I. Events Giving Rise to the Lawsuit

A. The School

The school newspaper at issue was produced by students at the College of Staten Island ("CSI" or the "College"), which is part of the City University of New York ("CUNY") system. Under state law, the CUNY Board of Trustees (the "CUNY Board") may impose

mandatory student activity fees to support student activities and regulate the expenditure of those funds. At all times relevant to this lawsuit, CSI students, as a condition for registering for classes, were required to pay mandatory student activity fees in an amount set by the CUNY Board. At CSI, a portion of the student activity fees is earmarked for a general fund to be allocated by the CSI student government to several extracurricular activities, including student publications.

The CUNY Board of Trustees Bylaws ("CUNY Bylaws") mandate that CSI establish a Student Elections Review Committee ("SERC"), which, among other responsibilities, approves election procedures and certifies election results. CUNY Bylaw § 15.2[d]. During a student government election, the SERC meets when needed to consider alleged violations of election rules and other complaints regarding the election process. The student government nominates individuals, who may be students, faculty, or administrative staff, to serve on the SERC. From those nominees, the CSI president appoints the members of the SERC. The intent of Bylaw § 15.2[d] is to limit the role of college presidents to "receiving appeals from the Student Elections Review Committee where an individual student has received a negative determination on a request." On appeal, the CSI president may uphold, reverse, or modify the SERC's determination.

Each spring, CSI holds annual elections for the Student Senate, as well as for other student government positions. Once elected, the CSI Student Senate in turn names a president and eight commissioners from among its members. One of the commissioners

chairs a "Committee on Publications" that is responsible for regulating student media outlets. In the 1996-1997 academic year, the allocation of student activity fees to student publications was made by the Student Senate based on the recommendation of the Committee on Publications.

B. Publications Funded by Student Activity Fees at CSI

CSI allocates student activity fees to fund a number of student publications, including the one at issue in this litigation, the *College Voice*. The *College Voice* is a student newspaper and political journal that is primarily paid for from student activity fees.[1] The *College Voice* publishes articles and editorials on a wide range of topics, including pieces on CSI, CUNY, local, national, and international affairs, reviews, and poetry. The editors of the *College Voice* choose the material that the newspaper publishes without any supervision or prior review by anyone other than the editors and staff of the newspaper. (The newspaper has a faculty advisor who does not review or approve articles prior to publication.) Participation in the *College Voice* is entirely extracurricular, and the editors and staff do not receive any academic credit for working on the newspaper.

In addition to the *College Voice*, CSI also funds a college radio station and other student media outlets using the student activity fees. The other outlets

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[1] The May 1997 issue of the *College Voice*, which is at the heart of this litigation, was funded entirely by student activity fees.

include the *Banner*, which the student government designated the official campus newspaper, a literary magazine named *The Third Rail*, and various other publications. CUNY and CSI have not placed any restrictions on the subjects that may be covered in the *College Voice* or the *Banner*.[2] These newspapers are

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[2] In 1995, CUNY Vice Chancellor for Legal Affairs Robert Diaz sent the CUNY Council of Presidents a memorandum entitled, "Regulation of Speech by an Institution of Higher Education." That memorandum stated, in part:

> The First Amendment protection of freedom of speech and of the press apply to student newspapers and other publications. Therefore, a public university may not impose any content-based prohibition on such publications except to serve a "compelling state interest" . . . . Similarly, a public university may not take adverse action against a student newspaper . . . or against a particular student because it disagrees with the content of a student newspaper. While a college may not interfere with the content of student publications, it may, consistent with the law described earlier, promulgate time, place and manner restrictions regarding the distribution of student publications.
>
> . . .
>
> While college or university property may not fall into the "quintessential" public forum category, the Supreme Court has held that property that the government has made available for expressive activity by the public also constitutes a public forum. . . . This category (often called a "limited public forum") has been broadened to include not just physical sites but "channels of communication opened for public speech." . . . Once a public institution creates such a public forum, even if it was not required to create it in the

(continued...)

not prohibited from publishing articles or editorials expressing opinions or endorsing candidates in student elections. There is no rule or regulation prohibiting or restricting the editors or staff members of the *College Voice*, or other publications, from running for student government positions or from endorsing themselves.

According to the plaintiffs' complaint, in the early 1990's the *College Voice* was designated the official college newspaper of CSI. Several years before the Spring 1997 election, the editors of the *College Voice* began publishing articles that reflected a generally "left-wing" perspective on campus, local, national, and international political issues. Many of the articles and editorials were critical of CUNY and CSI administration officials. These positions prompted some students, who disagreed with the *College Voice*'s editorial policy, to form a second student newspaper at CSI called the *Banner*. The CSI Student Government subsequently revoked *College Voice*'s designation as the "official" CSI student newspaper and gave that status to the *Banner*. In Spring 1997, the *Banner* was the official CSI student newspaper.

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[2](...continued)
first place, the institution cannot regulate expressive activity in that forum based on its content.

(internal citations omitted). In another case involving a student publication at CUNY, this court found that, in this memorandum, CUNY "expressly disclaim[ed] any right of the institution to control student publications, such as those financed through student activity fees." *Leeds v. Meltz*, 85 F.3d 51, 54 (2d Cir. 1996).

C. The Spring 1997 Election

i. The Student Union Slate

In the Fall 1996 term, some CSI students concerned about various student life issues at CSI and CUNY began meeting and formed an organization they called the "Student Union." During the student government elections in the Spring 1997 semester, the Student Union ran a slate of candidates for a total of 37 positions in the Student Senate and other governing organizations. Several editors and staff members of the *College Voice*, including some of the plaintiffs, were among the candidates running on the Student Union slate. The only opposing slate was "Students for Students" ("SFS"), which was composed mainly of incumbent members of the Student Senate seeking re-election. Almost all of the candidates in the Spring 1997 election were affiliated with either the Student Union or SFS slates.

The Spring 1997 student government election at CSI was scheduled to take place between April 30 and May 3, 1997. Before the election, CSI's SERC approved eight election rules. Two of those rules are at issue in this litigation. Rule 2 provided: "The campus newspaper may not be used as posters on walls, bulletin boards, etc. and may not be used as a means to distribute campaign flyers." Rule 5 stated: "The Student Government will be glad to make you 30 copies of your stamped and approved poster or flyer. All candidates must remove their election materials from the designated areas after the election is over."

ii. May 1997 Issue of the College Voice

Prior to the Spring 1997 election, the *College Voice* decided to endorse the Student Union slate.[3] By agreement within the *College Voice* editorial board, the decision about whether or not to endorse candidates, which candidates to endorse if the newspaper decided to do so, and what content to run in the issue was to be made by the members of the board that were not candidates in the Spring 1997 election. The *College Voice* chose to publish a special election issue that the editors intended to have distributed on April 28, 1997, two days before the beginning of the voting period.[4] The timing was a significant aspect of the *College Voice*'s message. An editor of the *College Voice* explained, "an important part [of publication] is not just the content of the newspaper, but timing and placement. And we felt that the timing a few days before the election would be the most opportune time to influence the election."

The May 1997 issue of the *College Voice* consisted of twenty-eight pages. The front page displayed a group photograph of twelve of the candidates running on the Student Union slate under a bold headline, "VOTE STUDENT UNION!" The rear cover of the newspaper featured only the Student Union's twelve-point platform. Page two of the issue contained an editorial entitled "Vote Student Union." Various candidates'

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[3] Previous issues of the *College Voice* had contained editorials and articles supporting the demands of the Student Union and encouraging students to join the new organization, as well as articles critical of the incumbent student government.

[4] Although the issue was scheduled to be distributed on campus on April 28, the date on the edition was "May 1997."

platform statements were printed on pages six and seven. The issue also included two articles by two of the plaintiffs criticizing the incumbent members of the student government who were running on the SFS slate, and two articles, one by a plaintiff and the other by a non-plaintiff, criticizing the CUNY chancellor. The remainder of the issue was devoted to articles on a wide variety of other matters, including pieces on international affairs, a New York City mayoral candidate forum, a work requirement for students receiving public assistance, campus security, the history of CUNY, the CUNY faculty union, and tenants' rights. It also included music reviews and poetry.

The *Banner* also published an election issue prior to the May 1997 election that included platform statements from candidates running on both the Student Union and the SFS slates.

iii. The Actions of the Student Government and CSI Administration

On April 28, 1997, the editors of the *College Voice* were informed by a representative at their printer that, although the issue had been printed and was ready for delivery, Student Government Publications Commissioner Juergen Schnetzer had directed the printer not to release the issue. Schnetzer was running for re-election on the SFS slate. On April 29, the attorney for the *College Voice* editors faxed a letter to CSI President Marlene Springer informing her that student government officials had directed the printer to impound the issue and requesting that she order the immediate release of the newspaper. The letter

was copied to various other individuals, including CSI Vice President for Student Affairs Carol Jackson and Student Government President Joseph Canale. President Springer consulted with Vice President Jackson and directed Jackson to ensure that the newspaper be released from the printer. Jackson spoke with both Canale and Schnetzer, but Schnetzer refused to rescind his order impounding the issue. Later that day (April 29), the Student Senate met in closed session to consider the administration's request to override Schnetzer's decision. The Student Senate refused to overrule the impound order.

Immediately following the Student Senate meeting, Vice President Jackson informed Canale that President Springer was overriding the Student Senate's decision and that the newspaper would be delivered to the CSI campus. Jackson directed college employees to retrieve the newspapers from the printer and bring them to campus, which they did later that afternoon.

After the *College Voice* was delivered to campus, Andre Woods, an incumbent member of the Student Senate running for re-election on the SFS slate, filed a complaint with the SERC. His complaint alleged that the May 1997 issue of the *College Voice* violated Election Rule 2, which provided that "[t]he campus newspaper may not be used as posters on walls, bulletin boards, etc. and may not be used as a means to distribute campaign flyers." Woods requested that "any candidate found in that aforementioned issue of the *College Voice* by any means such as a Platform Statement or otherwise be disqualified from the ongoing elections."

The SERC considered Woods's complaint regarding the alleged Rule 2 violations at a meeting on April 30, 1997, and declined to sustain it. But the SERC passed a resolution declaring that "[t]he *College Voice* used student activity fee funds allocated to promote the election of particular candidates affiliated with the *College Voice*" and adjourned until the next day to consider further action on the complaint. On May 1, the SERC met again and passed a motion "to postpone the election and to consider those ballots cast null and void as it is the committee's decision that the electoral process had been compromised beyond its ability to be fair to all candidates." The polls were closed for approximately two-and-a-half hours until President Springer ordered that they be reopened (after receiving a faxed appeal from plaintiffs' attorney and hearing protests from students who arrived at her office). She declared that she would rule on all election appeals after the election had concluded on May 3. President Springer directed Vice President Jackson to preserve the election results in case she reversed the SERC's determination on appeal.

Springer set a deadline of May 5, 1997 for students to submit appeals from the SERC determination. Her office received a number of submissions from students, including an appeal from the plaintiffs' lawyer and letters from other students in support of and in opposition to the SERC's determination.

iv. President Springer's Nullification of the Election

On May 6, 1997, President Springer issued a memorandum announcing her decision to affirm the SERC's nullification of the election because of the contents of

the May 1997 issue of the *College Voice*. The memorandum stated in relevant part

> The *College Voice* inappropriately used student activity fee funds to publish and distribute approximately five thousand copies of a twenty-eight page issue of the *College Voice* with a cover boldly encouraging a vote for a particular slate of candidates, some of whom are also staff members of the *College Voice*. Moreover, much of the issue was substantially devoted to supporting the endorsed slate of candidates. I find that this issue amounted to a thinly veiled student activity fee funded piece of campaign literature for the Student Union slate. As a result, the electoral process was compromised beyond its ability to be fair to all candidates, as argued by other candidates who requested nullification of the election.
>
> The April 30th to May 3rd election is therefore declared null and void, and a new election scheduled for the period Thursday May 8th, 1997 through Friday, May 16, 1997.

President Springer testified that, in making her decision, the only election rules adopted by the SERC that she relied on were Rules 2 and 5. The defendants, however, agree that candidates and slates were allowed, at their own expense, to post and distribute additional materials beyond the thirty posters or flyers paid for by the student government. They further concede that, during the Spring 1997 cam-

paign, both slates and some individual candidates printed their own literature and that this was not a violation of Rule 5. They also agree that Rule 5 was not a restriction on the content of newspapers.

President Springer further testified that, in making her decision, she also relied on a non-election rule. This rule, although not part of the eight rules expressly adopted by the SERC prior to the election, was printed on the nomination form for candidates in the Spring 1997 student elections. It stated:

> All candidates are **REQUIRED** to submit platform statements for **each seat they are running for**. Platform statements should be no less than 50 words and no more than 100 words per statement. Statements will be published in the campus newspaper. Statements must be typed or submitted on disk and will not be edited, so be sure you represent yourself clearly and concisely. Deadline for submission of statements is April 21, 1997.
>
> I am aware of the guidelines regarding platform statements and am aware that failure to submit statements for each seat for which I am running for will result in my disqualification as a candidate.

The rule's reference to the publication of candidate platform statements applied only to the *Banner*, as the official campus newspaper, and not to the *College Voice* or other CSI student publications. The student government regularly submitted candidate platform

statements to the *Banner* but did not submit the statements to the *College Voice*. This practice continued during the Spring 1997 election campaign, in the course of which the student government submitted the candidates' statements to the *Banner*. The *Banner* published the statements in its May 1, 1997 edition.

The day after President Springer nullified the election, the votes that had been cast were counted. The Student Union had won all thirty-seven positions for which the slate ran candidates. The Student Union candidates also won all thirty-seven positions for which they ran in the second election that was held from May 8 to May 16, 1997.

v. The Effect of President Springer's Actions on College Voice *Practices*

After President Springer's decision, the members of the *College Voice* considered removing every copy of the May 1997 issue from campus before the second election in order to avoid angering the administration. In elections held in subsequent years, the *College Voice* reduced its coverage of the elections because, as an editorial board member explained, it "recognize[d] that our endorsement could be a 'kiss of death' for candidates we support because if President Springer or the [SERC] disapprove of our election coverage, they may cancel the election or take some other action, such as disqualifying a candidate or a slate who we prominently endorse, or prohibiting the publication or funding of our newspaper." Indeed, in Spring 1998, candidates from the Progressive Student Alliance ("PSA"), many of whom were members of the *College Voice* or worked with the *College Voice* on

common political goals, expressed concern about the *College Voice* endorsing them because of the candidates' fear that an endorsement could lead the administration to cancel once again the election or disqualify PSA candidates. In order to prevent that outcome, the *College Voice* editors decided to give their endorsement of the PSA less prominence than the newspaper's endorsement of the Student Union slate had received in Spring 1997.

II. The Litigation Below

In their amended complaint, plaintiffs[5] sought relief, pursuant to § 1983, for violations of their rights under the First and Fourteenth Amendments.[6] The plaintiffs alleged, *inter alia*, that the defendants' actions represented an imposition of viewpoint-based restrictions on the publication of a student newspaper, thereby depriving the *College Voice* editors and staff

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[5] The plaintiffs included members of the editorial board of the *College Voice* who were also candidates on the Student Union slate in the Spring 1997 election (Sarah Husain, William Wharton, and Neil Schuldiner), members of the editorial board of the *College Voice* who were not candidates in the Spring 1997 election (Manjula Wijerama and Kasadore Ramkisson), contributors to the *College Voice* who were candidates on the Student Union slate in the Spring 1997 election (Devon Blinth and Kathleen McHugh), candidates on the Student Union slate who were not editorial board members of, staffers of, or contributors to the *College Voice* (Colleen McGraham and Jeff McGraham), and a student unaffiliated with the *College Voice* who voted in the Spring 1997 election but did not run for office (Marc Peseau).

[6] They also sought relief for violations of the New York State Open Meeting Laws. That claim is not pursued on appeal.

of their First Amendment right to be free from such restrictions in the state-created public forum. The parties named as defendants in the action were: President Springer; various CSI employees; various CUNY employees; CUNY and its Board of Trustees; CSI; and CSI's SERC (the "CUNY Defendants"). CSI students who served on the student government during the 1996-1997 academic year were also named as defendants (the "Student Government Defendants"). Plaintiffs sought declaratory judgment, injunctive relief, nominal compensatory damages of $1.00 from each of the defendants, and punitive damages of $1.00 from each of the Student Government Defendants and $20,000 from each of the CUNY Defendants.[7]

A. Preliminary Injunction Proceedings

The plaintiffs filed a motion for a preliminary injunction to prevent the CUNY Defendants from prohibiting plaintiffs from publishing endorsements of candidates in future student government elections at CSI or any other CUNY college and from taking reprisals against plaintiffs, including cancellation of any election results, for publishing such endorsements. During a hearing held before a magistrate judge on the motion, CUNY Associate General Counsel Michael Solomon confirmed that it was likely CSI would once again cancel student government elections

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[7] The district court subsequently approved a stipulation limiting any award for punitive damages to $1.00 per CUNY Defendant and permitting plaintiffs to seek compensatory damages from the CUNY Defendants up to an aggregate of $500.00.

if the *College Voice* published an edition similar to its May 1997 issue. Solomon told the magistrate judge, "I think if this happened again in spring 2000, the April 2000 elections and this identical issue came out, something [looking] like this and a student appealed, I think the Court should have a reasonable expectation the same thing would happen. The election results would be voided." Solomon also informed the magistrate judge that one way the *College Voice* could avoid these sanctions would be to submit its content to the SERC for pre-publication review. In light of these comments, the magistrate judge recommended that the district court grant the preliminary injunction.

After the magistrate judge issued her recommendation, defendants informed the district court that Election Rule 2 -- which, as amended, provided that "Publications funded by Student Activity Fee cannot be used as campaign flyers or posters during the student elections and cannot be used as a means to distribute campaign flyers or posters" -- had been repealed and that CSI would not reinstate the rule during President Springer's administration. Defendants further represented to the district court that they would not cancel any election in response to endorsements or opinions on elections published in school newspapers during Springer's administration. Accordingly, the district court denied plaintiffs' motion for a preliminary injunction.

B. The District Court's Decision on the Merits

In various early proceedings, the district court dismissed all of the defendants but CSI President

Springer, CSI Vice President Jackson, and a former administrative employee, Michael Silva.[8] In particular, it dismissed the Student Government Defendants on the ground that they were not state actors. It also found that plaintiffs' claims for injunctive and declaratory relief were moot. Following discovery, plaintiffs moved for summary judgment against defendant Springer on the First Amendment claim. Defendants also moved for summary judgment on the grounds that (1) there was no First Amendment violation and (2) if there were, they were entitled to qualified immunity.

Ruling on the summary judgment motions, the district court held that the cancellation of the election violated the First Amendment rights of the defendants. In doing so, it rejected defendants' argument that Election Rules 2 and 5 justified President Springer's actions. It also found no merit in defendants' contention that the plaintiffs suffered no First Amendment injury because the cancellation of the election, as opposed to a denial of funding or an impoundment of the paper, did not prevent the dissemination of the *College Voice*'s views. Judge Gershon explained that "[i]t cannot be that University action taken as a direct result of the views printed in a student newspaper can escape First Amendment scrutiny simply because that action was directed toward the nullification of the goal that the students espoused rather than at the vehicle, the newspaper, in which that goal was promoted. The chill on expressive freedom is the same." Judge

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[8] Another administrative employee was dismissed pursuant to a stipulation by the parties.

Gershon noted that chill was reflected in the *College Voice*'s coverage of subsequent student elections, and that such a chill amounted to a First Amendment violation.

Despite the district court's conclusion that Springer violated plaintiffs' First Amendment rights, the district court granted the defendants' summary judgment motion. It found that defendants Jackson and Silva could not held liable under § 1983 for this violation because Springer's conduct broke the causal connection between their actions and the harm to the plaintiffs.[9] And, it concluded that Springer was entitled to qualified immunity because it was not clearly established in May 1997 that her actions violated the First Amendment rights of the plaintiffs.

Plaintiffs appealed. In their action before this court, they contend that the district court erred when it held that President Springer was entitled to qualified immunity and when it dismissed the Student Government Defendants on the ground they were not state actors.[10]

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[9] The district court's finding as to Jackson was not appealed. Plaintiffs' challenge to the finding with respect to Silva was waived. *See infra* note 10.

[10] In their statement of questions presented and in the conclusion of their opening brief, plaintiffs assert they are also challenging the district court's holding that their requests for injunctive and declaratory relief are moot. But, in the text of the opening brief, plaintiffs make no arguments in support of this claim, nor do they do so in the reply brief. Similarly, at the end of their opening brief, the plaintiffs request their claims be

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DISCUSSION

I. President Springer Violated Plaintiffs' First Amendment Rights

A. Scope of First Amendment Rights for Student Media Outlets, and the Student Journalists who Produce Them, at Public Universities

Courts have long recognized that student media outlets at public universities, and the student journalists who produce those outlets, are entitled to strong First Amendment protection. These rights stem from courts' recognition that such student media outlets generally operate as "limited public fora," within which schools may not disfavor speech on the basis of viewpoint.

A limited public forum is "is created when the State 'opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects.' . . . In limited public fora, the government may make reasonable, viewpoint-neutral rules governing the content of speech allowed." *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 626

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[10](...continued)
reinstated against various defendants other than Springer, including Silva, but they do not discuss the issues relating to this ground for relief in the body of their briefs. Accordingly, we conclude that these claims are waived. *See Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (internal quotation marks omitted)). Plaintiffs expressly state that they do not appeal the dismissal of claims against Jackson.

(2d Cir. 2005) (emphasis and internal citations omitted). Once the state has created a limited public forum, however, it must respect the boundaries that it has set. It may not "exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (internal citations and quotation marks omitted). The forum itself can take many forms, yet the analysis of the constitutionality of restrictions imposed on speech made in the forum remains the same. See id. at 830 ("The [student activity fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.").

For over three decades, courts have acknowledged that a public university's establishment of a student media outlet typically involves the creation of a limited public forum, which means that the ability of school administrators to interfere with the speech made through such an outlet is generally strictly curtailed.[11] The Fourth Circuit, for instance, recog-

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[11] These decisions appear to be rooted in the Supreme Court's repeated admonitions that colleges play a critical role in exposing students to the "marketplace of ideas" and, as a result, First Amendment protections must be applied with particular vigilance in that context. *See, e.g., Healy v. James*, 408 U.S. 169, 180 (1972) ("[W]e note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. . . . [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than

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nized the strong First Amendment rights of student journalists at public colleges in *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973). There, the president of North Carolina Central University withdrew the University's support for the *Echo*, a student newspaper, because of his objections to the newspaper's content. The court held that the college president's actions violated the First Amendment rights of the students who produced the college newspaper. *Id.* at 462. It explained that "[i]t may well be that a college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment." *Id.* at 460.

The Fifth Circuit adopted a similar view in *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973). In *Bazaar*, officials at the University of Mississippi attempted to prevent publication and distribution of a student literary magazine because it used language that they considered to be inappropriate and in bad taste. The Fifth Circuit rejected the University's argument that

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[11](...continued)
in the community at large."); *see also Rosenberger*, 515 U.S. at 835-36 ("[The] danger . . . to speech from the chilling of individual thought and expression . . . . is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.").

the school had the same powers as a private publisher to restrict whatever content it saw fit. The court stated, "once a public school makes an activity available to its students, faculty, or even the general public, it must operate the activity in accord with First Amendment principles . . . [A] state university [cannot] support a campus newspaper and then try to restrict arbitrarily what it may publish, even if only to require that material be submitted to a faculty board to determine whether it complies with 'responsible freedom of the press.'" *Id.* at 574 (quoting *ACLU of Virginia v. Radford College*, 315 F. Supp. 893, 896-97 (W.D. Va. 1970)).

The court further explained that "[w]e are well beyond the belief that any manner of state regulation is permissible simply because it involves an activity which is part of the university structure and is financed with funds controlled by the administration. The state is not necessarily the unrestrained master of what it creates and fosters." *Id.* at 575 (citing *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970)). As a result, "in cases concerning school-supported publications or the use of school facilities, the courts have refused to recognize as permissible any regulations infringing free speech when not shown to be necessarily related to the maintenance of order and discipline within the educational process." *Id.* In light of the First Amendment rights enjoyed by student publications, the court found that the University could not restrict the distribution of the student magazine in the absence of special circumstances such as that the speech used was obscene or would prompt a violent disruption. Accordingly, the Fifth Circuit upheld the district court's determination that the

University's interference with the publication and distribution of the student magazine violated the First Amendment.

The Fifth Circuit reaffirmed the strong First Amendment protections enjoyed by student media outlets at public colleges in *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975). There, the president of Atlantic University removed three editors of the student newspaper allegedly because of the newspaper's poor quality under their leadership. The University argued that, because the editors were state employees, their free speech rights could be restricted by the University if those rights were outweighed by a more significant government interest, which it identified as "the university's interest in a publication which maintained high standards of grammar and literary value so as to project a proper view of the university and its student body." *Id.* at 260. The court resoundingly rejected this argument. It held that "the right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances." *Id.* The Fifth Circuit explained those special circumstances were limited to situations where the restrictions were necessary to maintain order and discipline within the educational process. The circumstances relied on by the University -- poor grammar, spelling, and language expression -- were "'clearly not the sort which could lead to significant disruption on the university campus or within its educational processes." *Id.* at 261. Accordingly, the court affirmed the district court's finding that the University's actions had violated the student journalists' First Amendment rights.

Relying on these cases, the Eighth Circuit adopted a similar understanding of the First Amendment protections afforded college newspapers in *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983). In *Stanley*, the *Minnesota Daily*, the student newspaper of the Twin Cities campuses of the University of Minnesota, published an especially controversial humor issue. In response, the University's Board of Regents changed the method by which it funded the newspaper and other student publications. Whereas student publications in the past had been funded by a mandatory student fee, the Board voted to allow students to obtain a refund of this fee if they so desired. Former editors of the *Daily*, the *Daily* itself, and the Board of Student Publications brought suit. They claimed that the Regents instituted the refundable fee system in response to the content of the humor issue and, as a result, violated the First Amendment. The Eighth Circuit agreed.

In support of its holding, the court explained, "[a] public university may not constitutionally take adverse action against a student newspaper, such as withdrawing or reducing the paper's funding, because it disapproves of the content of the paper." *Id.* at 282 (citing, *inter alia, Joyner*, 477 F.2d at 460). As a result, "to prevail on their First Amendment claim, the plaintiffs must show that the Regents' decision was adverse and that the decision was substantially motivated by the content of the newspaper." *Id.* As the plaintiffs demonstrated both that the decision was adverse, in that it created a chilling effect, and that it was substantially motivated by the content of the humor issue, the court held that the Regents' actions violated the First Amendment. *Id.* at 283-84.

The Fourth, Fifth, and Eighth Circuits, therefore, have adopted the position that the establishment of a student media outlet, in essence, necessarily involves the creation of a limited public forum where the only restraint is on the speakers who can participate (i.e., students) and where there can be no restrictions on the content of the outlet except with respect to content that threatens the maintenance of order at the university. Two other circuits, while also recognizing that student media outlets often enjoy First Amendment protection from interference by school administrators, have taken a less expansive view. The Sixth and Seventh Circuits agree that the establishment of a student media outlet *can* create a limited public forum but have concluded that the scope of that forum can be restricted by the school. In other words, these courts do not consider the creation of a student media outlet as *categorically* involving the creation of a limited public forum within which students may speak on essentially any subject without fear of reprisal, but rather look to the *context* of the public university's treatment of a student media outlet, including its intent in creating the outlet and practices with respect to the outlet, in order to determine what First Amendment protection the outlet, and those that participate in it, receive. *See Hosty v. Carter*, 412 F.3d 731, 735-36 (7th Cir. 2005) (en banc); *Kincaid v. Gibson*, 236 F.3d 342, 347 (6th Cir. 2001) (en banc).[12]

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[12] The Sixth Circuit analysis, however, likely was limited to the circumstances presented in that case. That court expressly stated "[o]ur decision to apply the forum doctrine to the student yearbook at issue in this case has no bearing on the question of whether and the extent to which a public university may alter

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Nevertheless, although the treatment of forum analysis with respect to student media outlets at public universities has differed in some respects in the various circuits, *all* the circuits that have considered the issue have determined that, at the very least, when a public university creates or subsidizes a student newspaper and imposes no *ex ante* restrictions on the content that the newspaper may contain, neither the school nor its officials may interfere with the viewpoints expressed in the publication without running afoul of the First Amendment.

We agree that, at a minimum, when a public university establishes a student media outlet and requires no initial restrictions on content, it may not censor, retaliate, or otherwise chill that outlet's speech, or the speech of the student journalists who produce it, on the basis of content or viewpoints expressed through that outlet. This holding is fully consistent with and, indeed, substantially follows from, our decisions, and those of the Supreme Court, in other cases addressing limited public fora. *See Peck*, 426 F.3d at 626; *Hotel Emples. & Rest. Emples. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 545 (2d Cir. 2002); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001); *Rosenberger*, 515 U.S. at 829.

Given our conclusion, we need not decide in this

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[12](...continued)
the content of a student newspaper." *Kincaid*, 236 F.3d at 348 n.6. In doing so, the court cited to many of the cases described above that reflect the categorical approach embraced by other circuits, including *Stanley*, *Schiff*, and *Joyner*.

case which of the two approaches embraced by other circuits governs evaluations of the First Amendment protections afforded student media outlets at public colleges. Because CUNY had a policy in which it expressly placed no limits on the contents of student publications, under even the less protective contextual approach of the Sixth and Seventh Circuits, it is clear that the *College Voice* was a limited public forum in which there were no restrictions on the subjects that could be addressed.[13]

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[13] We note that although we do not resolve precisely what type of forum analysis applies here, we have no doubt that the *College Voice* constituted a "limited public forum" and thus reject the arguments proffered by plaintiffs and amicus Student Press Law Center to the contrary. Drawing on the Supreme Court's reference to "private speakers" and "private speech" in *Rosenberger*, plaintiffs and the Student Press Law Center contend that the *College Voice* is not a public forum of any type. Rather, they assert the *College Voice* is an entirely private entity and any restrictions or retaliation taken against it should be evaluated as though the student newspaper were the *New York Times* or other similar private news organizations. This is not an accurate reading of *Rosenberger*. *Rosenberger*'s references to "private speakers" and "private speech" were employed to draw a distinction between the First Amendment restrictions that are imposed on the state when it provides funds for others to transmit its own message (i.e., where the speech involved is the government's message) and when it provides funds for others to promote their own views (i.e., where the speech involved is the message of the speakers). *Rosenberger*, 515 U.S. at 833-35; *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 861 (7th Cir. 2006) (recognizing that *Rosenberger*'s discussion of "private speech" refers to the speaker "not spreading state-endorsed messages"). Accordingly, while it is unquestioned that the student journalist plaintiffs in *Rosenberger* were "private speakers" in the sense that the student activity fee money they

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B. Springer's Actions Violated Plaintiffs' First Amendment Rights

i. The College Voice *Constituted a Limited Public Forum*

Under even the less protective approach for evaluating the scope of the First Amendment rights afforded student media outlets and the students journalists who work on them, it is clear that the *College Voice* was a limited public forum in which (subject always to the existence of a compelling state interest such as the maintenance of public order) the only permissible restriction was on the speakers who could participate. CSI, through the student government, chartered the *College Voice* and provided the newspaper with most of its funding through the allocation of student activity fees. The defendants agree that neither CUNY nor CSI had placed any restrictions on the subjects that could be covered in the *College Voice* or other student publications. Indeed, in earlier litigation before this court, CUNY "expressly disclaim[ed] any right of the institution to control student publications, such as those financed through student activity fees." *Leeds*, 85 F.3d at 54.

Accordingly, the policy and practice of CSI demon-

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[13](...continued)
received would be used to transmit a message of their choosing, that does not mean the vehicle through which those students sought to send their message -- the student publication -- was itself private. Moreover, nothing in *Rosenberger* suggests that the Court conceived of the student publication there at issue as private.

strate that the school intended to open the pages of the *College Voice* to "indiscriminate use" by the students who serve as its contributors and editors, and that it thereby created a public forum in which the only limit involved the nature of permissible speakers. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). Because the *College Voice* operated as such a forum, CSI and its officials could not, under the First Amendment, take adverse action against the student newspaper, including engaging in conduct designed to chill the speech contained in future editions, on the basis of the views expressed in the publication unless such action served a compelling government interest. *See Hotel Emples. & Rest. Emples. Union*, 311 F.3d at 545. The defendants have offered no arguments that the nullification of the May 1997 election advanced any such interest, and we can conceive of no interest of sufficient import to justify President Springer's actions given the First Amendment concerns involved. *See infra* note 14.

ii. President Springer Canceled the Spring 1997 Election Because of the Viewpoint Expressed in the May 1997 Issue of the College Voice

In its May 1997 issue, the *College Voice* clearly sought to express a viewpoint on the Spring 1997 election. This viewpoint was reflected both in the election-related content contained in the issue and in the manner in which that content was presented. The substance of the *College Voice*'s election-related material made clear the newspaper's support for the positions taken by the Student Union and its belief that the candidates on that slate should be elected. In order to emphasize the strength of its view that the

student body should elect candidates who supported running CSI in the manner advocated by the Student Union, the *College Voice* devoted almost its entire front cover and its complete back cover to promoting the election of candidates running on that slate, and included in the May 1997 issue the slate's platform statement as well as various exhortations urging the slate's election.

Remarks and testimony made by President Springer reveal that it was the *College Voice*'s viewpoint on the election -- expressed in both the substance of its content and in the manner in which that content was presented -- that led her to nullify the election. First, in announcing her decision, Springer noted the aspects of the May 1997 issue of the *College Voice* that caused her to nullify the initial Spring 1997 election included its "cover [that] boldly encourage[ed] a vote for a particular slate of candidates" and her assessment that "much of the issue was devoted to supporting an endorsed slate of candidates."

President Springer's testimony also shows that she nullified the election because of the viewpoint expressed by the *College Voice*. The following exchange occurred during President Springer's deposition:

Q: Is it your opinion that the *College Voice* has an obligation to present both sides of an issue?

A: Not any issue. Certainly they have a right to their opinion on issues, but as far as student elections is concerned, yes.

Q: Could you be very specific . . . I don't . . . want

to mischaracterize your testimony. Are you saying that the *College Voice* is required to have a balanced coverage of student elections?

A: Yes.

Q: Okay. Could you describe what is your understanding of balanced?

A: Presenting both slates.

Q: When you say presenting both slates, could the *College Voice* favor one slate over the other and say so in writing? Could they publish that?

A: It depends on whether it was a small statement in an editorial or whether it was part of their whole issue.

Q: So, is it your testimony then that the *College Voice* could appropriately endorse candidates if it was done in appropriate context?

A: Yes. If the candidates were fairly presented on both sides of the slate. If it were a one-piece campaign literature, then no.

Q: So, you're saying one of your requirements . . . for fairness in coverage is to present both sides; is that correct?

A: If -- yes, and honestly.

Q: . . . [Y]ou also said . . . there would be some differences as to how prominently the *College*

Voice voiced its opinion. Is that a fair characterization of your testimony?

A: It could well be, yes.

Q: . . . Is the decision to publish an opinion on the front page with a big headline as opposed to on a back -- on page 10 with a small headline, is that decision fundamentally reflecting an opinion about how important the story is?

A: I think in journalist practices it would be in that sense. But is it the editor's right to do that under these particular situations where we have regulations governing the campaign literature, no.

This exchange shows that President Springer's nullification of the election due to the May 1997 issue of the *College Voice* was premised on two types of viewpoint discrimination relating to the subject of student elections. First, Springer's action was driven by her belief that only one perspective was acceptable for speech on student elections in a student newspaper -- a viewpoint that reflected a balanced view of the candidates -- and that contrary views -- including that certain candidates should be elected -- were inappropriate. Second, Springer's testimony reveals that her nullification of the initial election was premised on her belief that the *College Voice*'s view as to the importance of electing the Student Union slate, as reflected in the presentation of the content promoting

those candidates, was improper and should be excluded from the limited public forum of the student newspaper.

That the views on the student election, expressed through the substance and presentation of the content in the May 1997 issue, led to Springer's conduct is further supported by comments made by a CUNY associate general counsel during the preliminary injunction hearing before the magistrate judge. There, the CUNY attorney stated, "I think if this happened again in . . . the April 2000 elections and this identical issue came out, something [looking] like this and a student appealed, I think the Court should have a reasonable expectation the same thing would happen. The election results would be voided." The CUNY attorney further told the magistrate judge that one way the *College Voice* could avoid such retaliation against its speech in the future would be to submit its content to the SERC for pre-publication review.

Such viewpoint discrimination is clearly impermissible in a limited public forum open to unrestricted speech on campaigns, candidates, and issues affecting CUNY. Indeed, as the Supreme Court and this court have repeatedly emphasized, once a state institution opens a limited forum to speech on a particular topic, it may not act against a speaker in that forum on the basis of views they express on that topic. *See Rosenberger*, 515 U.S. at 829 (finding that the state may not "exercis[e] viewpoint discrimination, even when the limited public forum is one of its own creation" and noting that "viewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum's limitations"); *see also Good News*

Club, 533 U.S. at 106-07; *Peck*, 426 F.3d at 626; *Hotel Emples. & Rest. Emples. Union*, 311 F.3d at 545. Yet, that is exactly what happened here: the *College Voice* was a limited public forum open to speech related to the Spring 1997 election and to which candidates should be elected, the *College Voice* expressed views on those subjects in its May 1997 issue, and Springer, by canceling the election, engaged in adverse action because of the views the newspaper offered.[14]

iii. The Defendants' Arguments For Why President Springer's Actions Did Not Violate the First Amendment Are Unavailing

a. The Nullification of the Election Created a Chilling Effect and Thus Violated the First Amendment

Defendants assert that any harm the plaintiffs may have suffered as a result of the nullification of the election does not rise to the level of cognizable constitutional injury. This argument is entirely without merit. When a state university official takes retaliatory action against a newspaper for publishing certain content in an effort to force the newspaper to refrain

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[14] Under the strict scrutiny applicable to government actions that impose such viewpoint discrimination, these actions would be permissible only if they served a compelling government interest and were narrowly tailored to achieve that interest. *See Hotel Emples. & Rest. Emples. Union*, 311 F.3d at 545. As mentioned above, however, and as the district court correctly noted, the defendants have made "no effort to show that [Springer's] actions were supported by a compelling state interest, or that there were [no] less intrusive alternatives to her decision to nullify the election results."

from publishing that or similar content in the future, the official's action creates a chilling effect which gives rise to a First Amendment injury. *See Stanley*, 719 F.2d at 283. Here, the record establishes that Springer's nullification of the election created just such a chilling effect.

As the district court explained, "there was a concrete action taken in nullifying a student election because of a publication supportive of a particular slate of candidates which won the election. The threat or chill that plaintiffs assert they felt regarding future issues of the newspapers is not merely subjective, but has already been experienced." In the wake of President Springer's actions in Spring 1997, the *College Voice* scaled back its coverage of elections and reduced the prominence and extent of its candidate endorsements in an effort to avoid provoking another election nullification. Accordingly, although Springer's actions did not entail impoundment of the May 1997 issue, the denial of funding, or the express prohibition of election coverage, her conduct nevertheless violated the plaintiffs' First Amendment rights as a result of the chill on student speech that it created. *See Zieper v. Metzinger*, 474 F.3d 60, 65 (2d Cir. 2007) ("It is well-established that First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech." (internal quotation marks omitted)).

b. The May 1997 Issue Did Not Constitute Candidate Speech Nor Did Its Content Violate Applicable Election Rules

The defendants contend, however, that the front and

back covers of the May 1997 issue of the *College Voice*, as well as the candidate position statements included in the inside of the issue, did not constitute the newspaper's speech, but rather was the speech of the candidates themselves. The defendants argue that President Springer nullified the election because of this method of *candidate* speech, which, they assert, violated the governing election rules by essentially creating 5,000 flyers for the Student Union candidates. This claim is unconvincing.

First, as the defendants concede, the *College Voice* was entitled to endorse candidates in the May 1997 student government elections. They further concede that there were no prohibitions against candidates also serving as editors or staffers on the *College Voice* or against such candidates endorsing themselves. As a result, it cannot be that the newspaper's endorsement of candidates who were also members of its staff converted those endorsements from "newspaper speech" to "candidate speech." Furthermore, the record in this case reflects that the *College Voice* editors who chose (1) what election-related content to include in the May 1997 issue, (2) which, if any, candidates to endorse, and (3) how to lay out the election-related content in that issue were not running in the election. In other words, the choice to speak in the way challenged by the defendants was not made by any of the candidates.

Alternatively, in making this argument, the defendants may be asserting that content such as platform statements, slogans, and exhortations to vote for candidates is necessarily candidate speech, even if technically selected for inclusion in a publication by

non-candidates. This position seems premised on an improperly narrow view -- in light of the nature of the forum at issue -- of what speech is encompassed in media coverage of an election. Moreover, it appears to stem from an impoverished understanding of the different *types* of media outlets that cover an election or politics, and the nature of content inherent in those outlets: In addition to outlets that offer "balanced" coverage, there are those that adopt a specific point of view and that -- throughout the publication (i.e., not just on the editorial page) -- provide content urging readers to embrace that view. To take national media outlets as examples, in addition to *USA Today*, which describes itself as offering the type of balanced views of an election that President Springer evidently favors, there are partisan media organizations, such as the *Nation* and the *Weekly Standard*, which regularly aggressively endorse their chosen candidates, parties, and ideas, and demonstrate their endorsements by, *inter alia*, reprinting that party's platform or putting a candidate's picture on the cover and urging readers to vote for him or her. These various news organizations all offer different perspectives, or views, on an election, but the latter's coverage is no more "candidate speech" than the former's.

In other words, the fact that a news outlet adopts and zealously promotes the views of the candidates or party it supports and aggressively urges the election of those candidates, or the fact that such speech, unsurprisingly, would tend to benefit those candidates, does not transform the media outlet's speech into candidate speech.

In any event, the *College Voice*'s publication of the

election-related content in the May 1997 issue did not violate any germane election rules. The two rules that the defendants assert justified President Springer's actions are Elections Rules 2 and 5. Rule 2 provided: "The campus newspaper may not be used as posters on walls, bulletin boards, etc. and may not be used as a means to distribute campaign flyers." Rule 5 stated: "The Student Government will be glad to make you 30 copies of your stamped and approved poster or flyer. All candidates must remove their election materials from the designated areas after the election is over." As the district court clearly and correctly explained, neither of these rules precluded the *College Voice* from publishing the election-related content in its May 1997 issue. We cannot do better than to restate that court's discussion:

> The only Rules that President Springer relied on and that defendants say are relevant, Election Rules 2 and 5, define the responsibility of the individual student candidates, not the scope of the content of the college newspapers. . . . The Rules do not, explicitly or even implicitly, preclude campus newspapers from endorsing candidates or running platform statements. There is nothing in the rules concerning "balanced" coverage, the "context" of editorials, or the placement of headlines or platform statements. Indeed, implicit in Rule 2's requirement that candidates should not use the newspapers as posters is the acknowledgment that the papers may contain favorable opinions and support for a candidate that he or she would *want* to post on a bulletin

> board. That Rule 5 provides that the student government will print and pay for 30 posters or flyers imposes no restriction on the number of issues of the school newspaper which may contain an endorsement. *There are simply no written guidelines to establish that what was printed in the May 1997 issue of the* College Voice *was prohibited.*

(second emphasis added).

We agree entirely with the district court's reading of the rules and therefore reject defendants' arguments that Springer's actions were no more than the content-neutral enforcement of the election regulations adopted by the SERC.

c. *President Springer's Actions Cannot Be Justified as Necessary to Ensure Viewpoint Neutrality in the Administration of CSI's Student Activity Fees Fund*

The defendants further argue that President Springer's actions were justified by her duty "to address[] the potential First Amendment violation arising from the use of the mandatory Student Activity Fee to favor the viewpoint of the candidate Plaintiffs over that of other candidates." This argument misapprehends how viewpoint neutrality requirements apply to mandatory student activity fees. The defendants are correct that when a state college implements a mandatory student activity fee, its procedure for allocating the funds that fee generates must be viewpoint neutral. This is totally different from, and in no way means, that the college has a duty to

ensure that the positions expressed by the recipients of the fees reflect a balance of viewpoints. Far from it; as long as the availability of the funds to student groups *is not restricted based on their viewpoint*, the college's administration of a mandatory student activity fee complies with the neutrality requirement demanded by the First Amendment. *See Board of Regents v. Southworth*, 529 U.S. 217, 232-33 (2000) (citing *Rosenberger*, 515 U.S. at 841).

Here, the fact that the *College Voice* expressed a particular viewpoint did not create a First Amendment concern relating to viewpoint neutrality with respect to CSI's administration of the student activity fee funds. No one disputes that the CSI student activity fee funds were distributed based on viewpoint-neutral criteria. Nor does any party dispute that the candidates on the rival slate, SFS, could have founded a newspaper that promoted their views and received student activity fee funds for it. (Indeed, the other campus newspaper at CSI, which also received student activity fee funds, was created by students who objected to the viewpoints espoused by the *College Voice*.) The fact that the supporters or candidates of the rival slate did not seek a student-activity-fee-supported media outlet of their own in no way means that the *College Voice*'s use of the student activity fee funds to express its views gave rise to a viewpoint neutrality issue regarding CSI's administration of the student activity fee fund. No one has here suggested any violations of the requirement that the student activity fee fund be administered in a viewpoint neutral manner. As a result, there was no abuse for President Springer to correct. Rather, far from remedying a (non-existent) viewpoint neutrality

problem, President Springer's actions created (a very real) one.

* * *

We conclude that President Springer's nullification of the Spring 1997 election violated the plaintiffs' First Amendment rights.

II. The Qualified Immunity Question Cannot be Resolved at Summary Judgment

Defendants argue that even if President Springer violated plaintiffs' First Amendment rights, she is nevertheless entitled to qualified immunity. The district court agreed and granted the defendants summary judgment on this ground. We, however, find that the district court's otherwise admirable opinion erred in this respect because material factual issues relevant to the qualified immunity question are in dispute.

A government official sued in his official capacity is entitled to qualified immunity in any of three circumstances: (1) "if the conduct attributed to him is not prohibited by federal law"; (2) "where that conduct is so prohibited, if the plaintiff's right not to be subjected to such conduct by the defendant was not clearly established at the time of the conduct"; or (3) "if the defendant's action was objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken." *See Sadallah v. City of Utica*, 383 F.3d 34, 37 (2d Cir. 2004) (internal quotation marks and alteration omitted). "Summary judgment should not be granted on the basis of a qualified

immunity defense premised on an assertion of objective reasonableness unless the defendant shows that no reasonable jury, viewing the evidence in the light most favorable to the Plaintiff, could conclude that the defendant's actions were objectively unreasonable in light of clearly established law." *O'Bert v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003) (internal quotation marks omitted).

Neither of the first two grounds for qualified immunity apply in this case. As explained in the previous section, President Springer's nullification of the election in response to the content published in the *College Voice* was prohibited by federal law. And the plaintiffs' right not to be subjected to her actions was clearly established in the spring of 1997. This court has explained that, in determining whether a right is clearly established for qualified immunity purposes, "the right . . . need not be limited to the specific factual situation in which that right was articulated." *Papineau v. Parmley*, 465 F.3d 46, 56 (2d Cir. 2006). This is because "the Supreme Court has declined to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, and has, instead, chosen a standard that excludes such immunity if in the light of pre-existing law the unlawfulness [is] apparent." *Id.* (citing *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 129 (2d Cir. 2004)) (internal citations and quotation marks omitted).

The state of the law in Spring 1997 was such that, when President Springer nullified the election in response to the content published in the *College Voice*,

it was clear that her actions violated the First Amendment rights of the student journalists. There can be no question that a reasonable official in President Springer's position should have been aware that the *College Voice* was a public forum, limited only with respect to the speakers who could participate and not with regard to the subject matters on which the newspaper could discuss, and thereby entitled to protection under Supreme Court law governing such fora. CUNY's general counsel office had distributed a memorandum to the presidents of colleges in the CUNY system in 1995, including President Springer, that expressly identified students [sic] newspapers and other publications as limited public fora. And, in a separate case that involved the status of student publications at CUNY schools and that predated Springer's election nullification, our court recognized that CUNY "expressly disclaim[ed] any right of the institution to control student publications, such as those financed through student activity fees." *Leeds*, 85 F.3d at 54.

And, the law governing impermissible restrictions on speech in a limited public forum such as the *College Voice* was also plainly apparent at the time of President Springer's actions. The Supreme Court had directly addressed the First Amendment rights to which speakers in such a forum were entitled in 1995. Thus, in *Rosenberger* the Supreme Court made clear that when a state creates a limited public forum related to student media outlets, such as the *College Voice*, it is not permitted to discriminate against speech made in that forum (including speech made by a student media outlet with a particular perspective on subjects open for discussion in the forum) based on

viewpoint. 515 U.S. at 831-32. In explaining its decision, the Supreme Court stated that the prohibition on viewpoint discrimination was rooted in long-standing "[v]ital First Amendment speech principles," including the need to protect against the "danger" of "chilling" student speech. It added that for a public college "to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Id.* at 836 (citing *Healy v. James*, 408 U.S. 169, 180-81 (1972); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

In the spring of 1997, therefore, it was evident that the *College Voice* was a limited public forum open to speech on any topic. It also was plain that the First Amendment prohibited a public college official from engaging in viewpoint discrimination within such a forum, and that actions taken by a college official that chilled protected speech within that forum violated the First Amendment. Accordingly, although no court had specifically held at the time that the *nullification of an election* on the basis of views expressed by a student newspaper violated the First Amendment where such nullification chilled future speech, the "unlawfulness" of Springer's actions was "apparent" "in the light of pre-existing law." *See Back*, 365 F.3d at 129. And the "contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.

. . . Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.")[15].

Because President Springer's conduct violated clearly established law, she is entitled to qualified immunity only if it was objectively reasonable for her to believe that her actions were lawful at the time she nullified the election. *See Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995). Defendants assert that President Springer decided to nullify the election because she believed doing so was necessary to vindicate Election Rules 2 and 5.

Although we, like the district court, conclude that those rules did not justify Springer's conduct, it is possible that a jury might find that it was "objectively

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[15] The district court's only basis for finding that Springer was entitled to qualified immunity -- its view that a court must have *specifically held* prior to Springer's actions *that nullifying a student election* on the basis of views expressed by a student newspaper *violated the First Amendment* for it to be clearly established that plaintiffs had a constitutional right not to be subject to such conduct -- was, therefore, in error. Significantly, the defendants do not address this basis for qualified immunity, i.e., whether the contours of the First Amendment right Springer violated were clearly established in 1997. Instead, the only argument the defendants make on appeal with respect to qualified immunity is that "President Springer . . . took no action against a student publication, much less an action in response to a viewpoint espoused by a student publication" and, as a result, she is entitled to qualified immunity. The argument that Springer did not take action against the *College Voice* based on its viewpoint is unconvincing for the reasons described in the previous section.

reasonable" for Springer, at the time she acted, to believe that her nullification was the lawful implementation of these content-neutral election rules. But, while such a conclusion *by a jury* may be permissible, it nonetheless is inappropriate for a court, at the summary judgment stage, to find that Springer is entitled to qualified immunity on this basis.

First, we have noted that "[s]ummary judgment on qualified immunity grounds is not appropriate when there are facts in dispute that are material to a determination of reasonableness." *Thomas v. Roach*, 165 F.3d 137, 143 (2d Cir. 1999). Here, there is a dispute as to whether and to what extent President Springer relied on any of the rules cited when she made her decision to cancel the election. The nature of this dispute is ably described in the magistrate judge's second Report and Recommendation, where that judge examined the defendants' claim that President Springer had relied on Election Rule 2.

The magistrate judge noted that the defendants "[i]nitially . . . . relied solely on an argument that the decision was well within President Springer's inherent authority to regulate student government elections and ensure a fair election process" and that they failed "to even make reference to [Rule 2] or to any regulation specifically prohibiting student funded newspapers from being used as campaign literature" until they raised the claim before the district court after the magistrate judge had recommended that plaintiffs be granted a preliminary injunction. The magistrate judge also pointed out that the defendants had offered "shifting" explanations before the magistrate and the district court of how much President

Springer relied on Rule 2, which, the magistrate judge concluded, "raises serious questions of material fact as to what extent, if any, President Springer relied on [Rule 2] in reaching her determination" to cancel the election. As a result, the magistrate judge found that it is "clear that there is a disputed issue of fact that would preclude summary judgment on the issue of whether President Springer relied on [Rule 2] in making her decision."

The concerns the magistrate judge expressed with respect to whether President Springer did in fact rely on Rule 2 apply equally to her asserted reliance on Rule 5. Defendants did not assert that President Springer relied on Rule 5 when deciding to nullify the election until well after the litigation was underway. And they have offered shifting explanations for the role that rule played in her decision over the course of this action.

In light of the disputed issues of material fact regarding President Springer's reliance on the election rules, summary judgment on the defendants' qualified immunity claim cannot be granted. *See Green v. City of New York*, 465 F.3d 65, 83 (2d Cir. 2006) (citing *Kerman v. City of New York*, 374 F.3d 93, 109 (2d Cir. 2004)) ("If there is a material question of fact as to the relevant surrounding circumstances, the question of objective reasonableness is for the jury.").

Second, even if there were no factual dispute regarding President Springer's reliance on the election rules, it would still be inappropriate to resolve the qualified immunity question on summary judgment. We noted that a jury *might* find that it was objectively reason-

able for Springer to believe that a nullification of the election on the basis of the election rules was lawful, because such nullification involved only the enforcement of content-neutral regulations. But a reasonable jury could equally well conclude the opposite, i.e., that any reliance on the rules was not an objectively reasonable basis for nullification of the election. And we have held that "[s]ummary judgment should not be granted on the basis of a qualified immunity defense premised on an assertion of objective reasonableness unless the defendant shows that no reasonable jury, viewing the evidence in the light most favorable to the Plaintiff, could conclude that the defendant's actions were objectively unreasonable in light of clearly established law." *O'Bert*, 331 F.3d at 37 (internal quotation marks omitted).

In other words, we cannot say, at the summary judgment stage, that Springer did in fact rely on Rules 2 and 5 in deciding to nullify the election. Nor can we say that even if she did so rely, a reasonable jury would be compelled to find such reliance objectively reasonable. Given these considerations, we conclude that the district court erred when it granted summary judgment to President Springer on the ground that she was entitled to qualified immunity. We therefore vacate the district court's grant of summary judgment.

III. The District Court Properly Dismissed the Student Government Defendants

Finally, plaintiffs challenge the district court's decision to grant the motion of the Student Government Defendants to dismiss the claims against them

because they were not state actors. We affirm the district court's dismissal of these defendants.

A private individual may be treated as a state actor for purposes of a constitutional challenge to his conduct only if his actions are "'fairly attributable to the state.'" *Leeds*, 85 F.3d at 54 (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)). "Extensive regulation and public funding, either alone or taken together, will not transform a private actor into a state actor; instead, the state must have exerted its coercive power over, or provided significant encouragement to, the defendant before the latter will be deemed a state actor." *Id.*; *see also San Francisco Arts & Ath. v. United States Olympic Comm.*, 483 U.S. 522, 547 (1987). A private entity does not become "a state actor merely because its conduct is authorized by a state law, where its conduct is not *compelled* by the state." *Loce v. Time Warner Entertainment Advance/-Newhouse Pshp.*, 191 F.3d 256, 266 (2d Cir. 1999) (emphasis added).

Here, plaintiffs have made no allegations that would permit the inference that the school authorities coerced or encouraged Student Government Publications Commissioner Schnetzer to impound the May 1997 issue, or coerced or encouraged the other Student Government Defendants to support his decision. In fact, according to the plaintiffs, when the school administrators learned of Schnetzer's actions, they urged him and the rest of the members of the Student Senate to rescind the impoundment. When the Student Government Defendants refused to do so, Presi-

dent Springer overruled their decision.[16] Accordingly, it cannot be said that the school officials even acquiesced to the Student Government Defendants' actions, keeping in mind that such acquiescence would still be insufficient to demonstrate that the Student Government Defendants were state actors. *See San Francisco Arts & Ath.*, 483 U.S. at 547.

Despite these facts, the plaintiffs insist that the Student Government Defendants were state actors because the Student Senate's existence and its power to regulate student organizations, including the *College Voice*, derive from the CUNY Bylaws and CSI Governance Plan. But, assuming that state law or regulations gave the Student Government Defendants the power to act as they did, these laws and regulations certainly did not require the Defendants to do so. As a result, the state authorization was insufficient to establish that the Student Government Defendants were state actors in the circumstances

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[16] Plaintiffs also argue that the Student Government Defendants were state actors because they exercised a power "traditionally [within] the exclusive prerogative of the state," *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974); *see also Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982), or because their actions were inextricably interwoven with the actions of CSI administrators, *Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany*, 399 F. Supp. 2d 136, 145 (N.D.N.Y. 2005) (finding that Student Government "clearly acts in concert with the state to create a forum for the exercise of First Amendment rights. The SA determines the amount of the fee. The state collects it, enforces its payment, and turns it over to the SA. The SA distributes the money pursuant to state regulation and approval"). These arguments, however, are belied in this case given Present Springer's unilateral decision to overrule the SERC's order impounding the *College Voice*.

presented here. *See Loce*, 191 F.3d at 266.

We therefore find that the district court correctly concluded that, in the circumstances presented in this case, the Student Government Defendants were not state actors and properly dismissed them as defendants.

CONCLUSION

For the foregoing reasons, we VACATE the district court's grant of summary judgment to President Springer based on her qualified immunity and REMAND for further proceedings.

We AFFIRM the district court's dismissal of the Student Government Defendants.[17]

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[17] We note that at oral argument, counsel for plaintiffs conceded that the only relief sought in this litigation is nominal damages. We do not decide at this time the significance of that concession with respect to the determination of attorney's fees in light of *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 484 F.3d 162 (2d Cir. 2007), and related cases. *See, e.g., Farrar v. Hobby*, 506 U.S. 103, 114-15 (1992); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 n.5 (2d Cir. 1999).

DENNIS JACOBS, *Chief Judge*, concurring in part and dissenting in part:

I concur in the majority's result insofar as it affirms the dismissal of some claims, but I dissent insofar as it reverses the grant of qualified immunity.

I concede that this short opinion of mine does not consider or take into account the majority opinion. So I should disclose at the outset that I have not read it. I suppose this is unusual, so I explain why.

* * *

The majority has fulfilled its responsibility to explain at some length its vacatur of a part of the district court's judgment. But this is not a case that should occupy the mind of a person who has anything consequential to do. In a nutshell, the editors of the *College Voice* student newspaper used it as a campaign flyer to promote the self-styled radicals of the "Student Union" party in a long-ago student election, and the college president, finding that the partisan use of student-activity funds made a mockery of the election rules, directed that the election be re-run. The gist of the complaint is that the editors' speech was chilled, which is deemed to be a bad thing.

This is a case about nothing. Injunctive relief from the school's election rules is now moot (if it was ever viable); and plaintiffs' counsel conceded at oral argument that the only relief sought in this litigation is

nominal damages. Now, after years of litigation over two dollars, the majority will impose on a busy judge to conduct a trial on this silly thing, and require a panel of jurors to set aside their more important duties of family and business in order to decide it. *See Amato v. City of Saratoga Springs*, 170 F.3d 311, 322-23 (2d Cir. 1999) (Jacobs, *J.*, concurring) (noting that a trial over one dollar is a "wasteful imposition on the trial judge and on the taxpayers and veniremen").

With due respect to my colleagues in the majority, and to whatever compulsion they feel to expend substantial energies on this case, I fear that the majority opinion (44 pages of typescript) will only feed the plaintiffs' fantasy of oppression: that plutocrats are trying to stifle an upsurge of Pol-Potism on Staten Island. Contrary to the impression created by the majority's lengthy formal opinion, this case is not a *cause célèbre*; it is a slow-motion tantrum by children spending their graduate years trying to humiliate the school that conferred on them a costly education from which they evidently derived small benefit. A selection from the illiterate piffle in the disputed issue of the *College Voice* is set out in the margin for the reader's fun.[1]

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[1] One student journalist laments that he is no longer the friend of the incumbent president of the student government: "I am very sad today. I lost a friend; his name is Joe Canale. . . . Things changed on April 9, 1997. It was a pizza day I won't forget. . . . Joe did not shake my hand and all he said to me, in a rather drone voice, was 'Getting ready for the elections?' From that point on I knew, Joe had disowned me, all because of my affiliation with [the Student Union]. . . . 'When I found out he renounced my friendship, because of my affiliation with Student

(continued...)

[1](...continued)
Union, I adopted the slogan "Joe Must Go" to console me in my hour of need.'"

Another article denounces "pizza politics": free pizza at student events is "another of the perverse policies set forth by this bureaucratic institution. The pizza is most certainly not 'free'. It was paid for, in full, by the student body of the College of Staten Island, it belongs to them. The pizza is the property of the student body, not of the student government." The same writer is agitated by a student-government planned "Solidarity/-Unity Fest" which included a "velcro wall, a climbing mountain, a gladiator joust, a laser tag maze, human bowling, a bungee run, a velcro wall [another velcro wall?], human fooseball [sic], face painters, jugglers, mimes, 12 different carnival style games and things of that nature." According to the author, this "Fest" was an "attempt[] to coerce votes out of the student body in exchange for carnal pleasures." The article closes with a call to "end the evil tyranous [sic] reign of the current [student government] by whatever means necesaary [sic]."

The paper's coverage of a "so-called Mayoral Forum" complains that the two political parties "have historically been slaves to the Wall Street corporate tycoons, while either ignoring or killing the working class and poor people of this city and nation."

An editorial sets out the goals of the paper: "We oppose the poisonous divisions fostered on the basis of race by the bosses, who make Black and white workers fight each other for the crumbs off their table . . . even though it is the workers who produce all the wealth." The paper "seeks to engage all those who are committed to fighting exploitation and oppression in common action against the common enemy . . . capitalism." (ellipsis in original).

The issue features the Student Union's "12-Pt. Program For Change," including a call to "END CORPORATE CONTROL OF THE BOOKSTORE" so that it can "be returned immediately to

(continued...)

* * *

On the merits, I would affirm for the reasons given in Judge Gershon's careful and thorough opinion (which I *have* read).

President Springer's decision to re-run the election was (to apply the governing standard) not unreasonable in light of clearly established law. The school adopted election rules intended to level the playing field and limit the use of student-activities funds for election-related purposes. President Springer's decision was based on her view that the May 1997 issue of the *College Voice* was "a thinly veiled student activity fee funded piece of campaign literature for the Student Union slate." The majority remands for a trial on whether the college president acted on an impermissible belief that a school newspaper funded by (compelled) student-activities fees should be balanced.

I think that the First Amendment protects the freedom of the press and that this protection should be strongest when a newspaper prints election-related content at election time. But this area of the law is (unfortunately) far from clear.

In 2003, six years *after* the student-government election at issue, the Supreme Court upheld numerous

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[1](...continued)
the student body." The reason: "CUNY in general and CSI in particular have become the crown jewel in [Barnes & Noble's] campaign of corporate terror."

limitations on speech during election time -- in an opinion that could open the way to direct regulation of a newspaper if its election coverage becomes too "slanted" or "biased." *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 283-86 (2003) (Thomas, *J.*, concurring in part and dissenting in part). In 2004, this Court upheld a state election law that provided for the regulation of news stories about candidates based on the discretionary rulings of the law's administrators. *See Landell v. Sorrell*, 382 F.3d 91, 181-82 (2d Cir. 2004) (Winter, *J.*, dissenting), *rev'd sub nom. Randall v. Sorrell*, 126 S. Ct. 2479 (2006). That discretion to ensure a "fair" election is the same kind of discretion that President Springer exercised here.

In this light, it cannot be said that in 1997 there was a clear line between [i] a viewpoint-based reprisal against a campus newspaper and [ii] the implementation of neutral and constitutional election standards. In any event, a school administrator should not have to become a constitutional-law professor in order to save herself from personal liability when giving a needed lesson in fair play.

* * *

This prolonged litigation has already cost the school a lot of money that could better have been spent to enrich course offerings or expand student day-care. If this case ends with a verdict for plaintiffs (anything is possible with a jury), the district court will have the opportunity to consider whether the exercise merits an award of attorneys' fees in excess of one-third of two dollars.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 97 CV 2982 (NG)(CLP)

Decided and Filed March 28, 2002
193 F. Supp. 2d 664 (E.D.N.Y. 2002)

SARAH HUSAIN, *et al.*,
Plaintiffs,

-v.-

MARLENE SPRINGER, *et al.*,
Defendants.

OPINION AND ORDER

NINA GERSHON, U.S.D.J.:

Before the court are three motions, two of which were referred to Magistrate Judge Cheryl Pollak, and one of which was heard directly by this court.

I. OBJECTIONS TO JUDGE POLLAK'S REPORT AND RECOMMENDATION

Defendants City University of New York ("CUNY"),

the College of Staten Island ("CSI"), the Board of Trustees of CUNY, The Student Election Review Committee ("SERC"), and the individually named members of the CSI and CUNY administrations[1] (collectively, the "CUNY defendants") move for an order pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) dismissing plaintiffs' claims. Plaintiffs, in turn, move for an order pursuant to Fed. R. Civ. P. 56 granting summary judgment as to CSI President Marlene Springer. These motions were referred to Judge Pollak, who issued a Report and Recommendation ("RR") on May 1, 2001, to which both plaintiffs and defendants have filed objections. I have therefore reviewed their objections under the *de novo* standard of review. Fed. R. Civ. P. 72(b).

Judge Pollak provides a detailed description of the facts of this case in her Report and Recommendation on these motions dated May 1, 2001. The heart of this case is the decision to postpone a student government election at CSI in the spring of 1997. The Student Election Review Committee ("SERC") made the initial decision to postpone the election on May 1, 1997, after receiving a complaint that the *College Voice*, a student newspaper that was funded in part by mandatory student fees, had run an issue that contained two pages of platform statements by candidates running on the opposition Student Union slate and an endorsement on the front page encouraging readers to "Vote

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[1] These are defendant officers or employees of CSI, Marlene Springer, Carol Jackson, Kathleen Galvez, Marla Brinson, Michael Silva, Winsome Alston, and Sibi Geevarghese, and officers or employees of CUNY, W. Ann Reynolds, Robert E. Diaz, Roy Moskowitz, Michael Solomon, and Matthew Goldstein.

Student Union!"

Following the SERC's decision, the polls were closed while plaintiffs and other Student Union candidates appealed the decision to CSI President Marlene Springer, who reopened the polls later that day, but reserved the final decision on the validity of the election until after the completion of voting. On May 6, 1997, President Springer affirmed the SERC's decision nullifying the election and scheduled a new election. She explained her decision as follows:

> The *College Voice* inappropriately used student activity fee funds to publish and distribute approximately five thousand copies of a twenty-eight page issue of the *College Voice* with a cover boldly encouraging a vote for a particular slate of candidates, some of whom are also staff members of the *College Voice*. Moreover, much of the issue was substantially devoted to supporting the endorsed slate of candidates. I find that this issue amounted to a thinly veiled student activity fee funded piece of campaign literature for the Student Union slate. As a result, the electoral process was compromised beyond its ability to be fair to all candidates, as argued by other candidates who requested nullification of the election.
>
> The April 30th to May 3rd election is therefore declared null and void, and a new election shall be scheduled for the period Thursday May 8th, 1997 through Friday, May 16, 1997.

The Student Union candidates won all 37 races at both the canceled election and the rescheduled election.

First Amendment Claim

In her Report and Recommendation Judge Pollak correctly defines the issue as whether President Springer's decision was a constitutionally permissible content-based determination designed to confine the speech in the student newspaper within the scope of a limited public forum or whether it was a decision based on impermissible viewpoint discrimination. Judge Pollak found that there is a genuine issue as to "whether President Springer's decision was a legitimate exercise of the right of the university to regulate speech within the limited public forum, or whether her decision was based on the views expressed by the College Voice." RR 27. I agree with Judge Pollak.

I further agree with Judge Pollak's analysis as to why plaintiffs' motion for summary judgment against President Springer on this claim should be denied. Plaintiffs, in that motion, limit their argument to a claim that the mere review by President Springer of the *College Voice* issue in question violated their First Amendment rights. For the reasons stated by Judge Pollak, this argument does not entitle plaintiffs to relief. As Judge Pollak stated:

> the fact that President Springer had to review the content of the newspaper in order to determine that it constituted campaign literature is not the controlling question presented here. *Rosenberger v. Rector and*

> *Visitors of the University of Virginia* made it clear that, in the context of a limited public forum, the State may engage in content discrimination in order to preserve the purposes of the limited public forum, and in doing so, may not only exclude certain groups from participating in the forum, but may also exclude the discussion of certain topics. 515 U.S. 819, 829-30 (1995). By necessity, the State must review the content of the speech to determine whether it is the type of speech that fits within the topics or categories of speech for which the limited public forum was established. *Cf. Hill v. Colorado,* 530 U.S. 703, 120 S.Ct. 2480, 2492 (2000) (noting that the Court has "never held, or suggested, that it is improper" to review the content of speech to determine whether it is prohibited by a particular rule or regulation).

RR 26-27.

Given that the First Amendment claim is viable, that summary judgment cannot be granted to the plaintiffs, and that resolution of the claim must await further discovery, there is no need to further address certain disputes which plaintiffs have with Judge Pollak's particular analysis of First Amendment law in the Report and Recommendation. Similarly, disputes between the parties and with the conclusions of the Report and Recommendation regarding the significance of the 1997 SERC Rule relating to elections need not be resolved at this time. Suffice to say that plaintiffs state a claim and that the limited

ground upon which plaintiffs seek summary judgment is insufficient to warrant relief.

I do, however, address the Supreme Court's decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), decided after issuance of the Report and Recommendation, because plaintiffs argue that it casts doubt on the analysis used by Judge Pollak in rejecting their motion for summary judgment. Plaintiffs' reading of *Good News Club* is incorrect. Under plaintiffs' analysis of the case, any review of the content of a school newspaper by the school administration necessarily establishes viewpoint discrimination. However, the holding of *Good News Club* is not this broad. In *Good News Club*, a public school that opened its facilities to community groups, including groups that promote moral and character development of children, refused to allow a Christian group that promotes moral and character development to use the school facilities. The Supreme Court "reaffirmed our holdings in *Lamb's Chapel v. Center Marches Union Free School Dist.*, 508 U.S. 384 (1993), and *Rosenberger*[, 515 U.S. at 819] that speech discussing *otherwise permissible subjects* cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." 533 U.S. at 110-111 (emphasis added). *Good News Club* does not mean that every decision made by a school official regarding expressive activity is subject to attack as viewpoint discrimination. Rather, it remains the law after *Good News Club* that the "State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.' *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 . . . (1995)." [*Good News Club, supra*,

533 U.S.] at 106.

Eleventh Amendment Immunity for CUNY, CSI, and the CUNY Board of Trustees

Plaintiffs do not oppose dismissal of all federal claims for damages against CUNY, CSI and the CUNY Board of Trustees. In addition, all claims for damages against Matthew Goldstein, identified in the complaint as the current CUNY chancellor and CEO of CUNY, and sued only in his official capacity, are dismissed under the Eleventh Amendment.

Also, as recommended by the Report and Recommendation (and apparently not the subject of dispute), the claims for money damages against CUNY individual defendants Springer, Jackson, Silva and Brinson in their official capacities are dismissed under the Eleventh Amendment.

However, plaintiffs object to the Report and Recommendation's conclusion that the State law claims against CUNY, CSI, and the CUNY Board of Trustees should be dismissed under the Eleventh Amendment. It is undisputed that CSI is a senior college. For the reasons stated by Judge Pollak, *see* RR 36-41, I agree that the Eleventh Amendment bars these claims. *See Hester-Bey v. New York City Technical College*, 2000 WL 488484 *2, [2000 U.S. Dist. LEXIS 5323] (E.D.N.Y. 2000) (holding that, under *Pikulin v. City University of New York*, 176 F.3d 598, 599-600 (2d Cir. 1999), CUNY senior colleges are arms of the State for Eleventh Amendment immunity purposes); *Salerno v. City University of New York*, 2000 WL 1277324 *3, [2000 U.S. Dist. LEXIS 12933] (S.D.N.Y. 2000) (same); *Becker v. City University of New York*, 94 F.

Supp. 2d 487, 490 (S.D.N.Y. 2000) (same).

Plaintiffs, citing to *National Foods, Inc. v. Rubin,* 936 F.2d 656 (2d Cir. 1991), argue that the State has waived sovereign immunity for claims brought under the New York State Open Meetings Law, N.Y. Public Officers Law §100-111 ("OML"), because N.Y. Public Officers Law §107[1] "does not require that an action to enforce the OML be brought in a specific court." Plaintiffs' Objections to RR 52. However, a State does not waive sovereign immunity merely by failing to specify what court a statute may be enforced in. As the Court of Appeals for the Second Circuit held in *National Foods, Inc.*:

> A federal court will find that that immunity has been waived only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction. Not only must the state be found clearly to have subjected itself to suit, but it must also be found to have subjected itself to suit in *federal court.*

936 F.2d at 659 (emphasis in original) (citation and quotation omitted). Unlike in *National Foods, Inc.*, which held that the State had waived sovereign immunity against suits for reasonable attorney's fees where the statute at issue required the State to provide legal defense for employees against actions in federal or state court and permitted "the court" to resolve disputes over attorney's fees, the OML does not mention enforcement in federal court, and the only reasonable construction from the overwhelming

implications of the text is that the State did not waive sovereign immunity.

Eleventh Amendment Immunity for SERC

According to the complaint, SERC is a committee chaired by a CSI Administrator (defendant Silva) and established pursuant to Article 15.2(d) of the bylaws of the CUNY Board of Trustees to supervise student elections and adjudicate disputes and complaints in student elections. Third Amended Complaint ¶32. Under CUNY Bylaw 15.2(d), "[e]ach college shall establish a student elections review committee in consultation with the various student governments. The student elections review committee shall approve the election procedures and certify the results of elections for student governments, and student body referenda." As a creature of CSI, which is entitled to sovereign immunity as a CUNY Senior College, I therefore find that, as a matter of law, SERC is also entitled to sovereign immunity protection from a suit for damages because the real party in interest is the State. *See Thaler v. Casella,* 960 F. Supp. 691, 700 (S.D.N.Y. 1997) (holding that a grievance committee is entitled to Eleventh Amendment immunity because, since it is "part of the judicial arm of the state of New York," the State is the real party in interest); *Salerno,* 2000 U.S. Dist. LEXIS 12933, 2000 WL 1277324 *3 (holding that the Calandra Institute, a research center affiliated with CUNY, is entitled to Eleventh Amendment immunity because it is "under the control" of CUNY).

Injunctive and Declaratory Relief

The issue of mootness affects the subject matter jurisdiction of the court and therefore may be addressed at any time. Judge Pollak appropriately raised the issue for the court's consideration, even though the CUNY defendants had not initially raised the issue in their motion to dismiss. All parties have now had a full opportunity to address the issue. Based upon my *de novo* review of the issue, I find that all claims for injunctive and declaratory relief based upon the Spring 1997 election are moot.

In an Order of March 23, 2000, denying plaintiffs' motion for a preliminary injunction, I stated my understanding, based upon representations from the CUNY defendants, "that the rule applicable in the 1997 election that stated that 'Publications funded by Student Activity Fee (sic) cannot be used as campaign flyers or posters during the student elections and cannot be used as a means to distribute campaign flyers or posters' has been repealed, and

> further it is agreed that defendants will not change the Rules governing the Spring 2000 Student Elections at the College of Staten Island prior to the resolution of litigation in this case or, in fact, during the duration of President Springer's administration, nor will defendants cancel any election in response to endorsements or opinions on elections published in student newspapers. In sum, defendants have agreed that they will not prohibit any College of Staten Island student activity fee-funded publications from being used as campaign flyers and posters.

Although Judge Pollak noted that this commitment does not extend "indefinitely into the future," RR 57, and plaintiffs argue that there is a possibility that CSI may change its policy after President Springer leaves office, "some reason must support Plaintiffs' insistence that the alleged violation is likely to recur. Defendants' burden concerning the unlikelihood of recurrence is a heavy one, but it by no means requires proof approaching metaphysical certitude." *Committee for the First Amendment v. Campbell,* 962 F.2d 1517, 1524-25 (10th Cir. 1992) (holding that a First Amendment challenge to a university's policy governing what films may be screened on campus was moot because the university had met its burden of establishing no reasonable expectation of the wrong's recurrence by changing its policy to comply with the plaintiffs' demands, and that the mere suggestions by plaintiffs that the university could abandon or rescind the policy at some point in the future was insufficient to establish that a violation is likely to recur). By agreeing not to reinstate the challenged rule or engage in the challenged behavior, defendants have met their burden of showing that the alleged violation is unlikely to recur, and plaintiffs have offered nothing to contradict this showing.

As Judge Pollak found, plaintiffs cannot establish that this case falls within the exception for cases which are likely to recur but evade review. *See* RR 56 n. 29. Nothing in plaintiffs' objections provides anything but conclusory and speculative arguments to the contrary.

Claims against Chancellor Reynolds; Vice President for Student Affairs Jackson; Chairperson of

SERC Silva; the SERC Member Defendants (Alston and Geevarghese); and the Attorney Defendants (Diaz, Moskowitz, Solomon and Galvez)

For the reasons set forth by Judge Pollak, all claims against each of these defendants, except Chairperson Silva and Vice President Jackson, will be dismissed.

The Fall 1997 Election (Fourth Cause of Action)

In the fall of 1997 SERC ordered a student election (not the same election which is the subject of the other claims) extended two days after defendant Marla Brinson, the Director of Student Life at CSI, prohibited several plaintiffs from distributing campaign literature bearing the name "Student Union." According to plaintiffs, President Springer acted to the detriment of the plaintiffs when she canceled one of the two additional days. Plaintiffs simply argue that the reduction of the election extension ordered by SERC should be viewed as part of a pattern of acts by Springer that targeted plaintiffs, and their colleagues with the same views, with disfavored treatment.

Judge Pollak recommends dismissal of all defendants sued in this claim, *i.e.* Springer, SERC and the members of SERC, except Brinson. Plaintiffs object only to the extent that they argue that Springer should not be dismissed, and do not oppose dismissal of the fourth cause of action against SERC. For the reasons stated by Judge Pollak, I agree that this claim should be dismissed against all defendants except Brinson.

Claims by Plaintiff Peseau and Standing of All Plaintiffs

Plaintiff Peseau sues as a voter in the 1997 election. The Report and Recommendation finds that he has standing to raise the First Amendment claim, along with the student journalists and candidates. I agree and reject the objections of the defendants.

II. DISMISSAL OF STUDENT DEFENDANTS (SECOND CAUSE OF ACTION)

In addition to the claims brought against Marlene Springer, Carol Jackson, Kathleen Galvez, Marla Brinson, Michael Silva, Winsome Alston, Sibi Geevarghese, W. Ann Reynolds, Robert E. Diaz, Roy Moskowitz, Michael Solomon, CUNY, the CSI, the SERC, the CUNY Board of Trustees, and Matthew Goldstein, plaintiffs have also made certain allegations against Joseph Canale, Juergen Schnetzer, Andre Woods, Charlo Almeda, Christopher Alvarez, Kelly Anne Biesty, Mary Anne Christensen, and Luis Cruzatte, all of whom are unrepresented by counsel. These defendants, who are former elected officers of the CSI Student Government, are sued in both their individual and "official" capacities. Third Amended Complaint ¶38. Plaintiffs have agreed to dismissal of all claims against student defendant Andre Woods.

Since the student defendants were unrepresented by counsel, and I questioned whether they were state actors, I directed the plaintiffs to address this issue, and they have done so. The student defendants, as well as the Attorney General's office, have responded to the plaintiffs' brief on the subject, and plaintiffs

have replied.[2]

In a recent case, *Leeds v. Meltz,* 85 F.3d 51 (2d Cir. 1996), the Court of Appeals for the Second Circuit found that a would-be advertiser, whose advertisement seeking information discrediting the CUNY Law School was rejected by the student editors of the Law School's monthly paper, could not sue the student editors, the acting dean of the Law School, or the Law School because he had failed to allege sufficient facts to support the claim that the rejection amounted to state action. Relying on *Rendell-Baker v. Kohn,* 457 U.S. 830 (1982), the Court found that the actions of the student defendants were not, as required by *Rendell-Baker*, "fairly attributable to the state" and that, since the decision to reject the advertisement had been that of the students, there was no state action on the part of any defendant.

As the Court of Appeals did in *Leeds*, I look to the specific allegations of the complaint to determine whether the actions of the students, who are private individuals, are "fairly attributable to the state." The essence of the claim against the student defendants is set forth in three paragraphs of the Third Amended Complaint as follows:

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[2] The student defendants also have filed affidavits seeking judgment in their favor on various additional grounds. Without having filed a motion for summary judgment, they appear to be seeking to convert what is in effect a motion to dismiss to one for summary judgment. Since I directed plaintiffs to address only the state action issue, any effort to turn this motion into one for summary judgment on the merits is rejected, without prejudice, and none of the factual materials submitted by the student defendants have been considered.

44.On Thursday, April 24, 1997, the copy for the May 1997 edition of the *College Voice* was delivered to the printer. The issue was scheduled to be printed and delivered to campus by 8 PM on Monday, April 28th. Voting in the Spring Election was scheduled to begin on April 30th at 9 AM and the election was to run until the afternoon of May 3, [1997]. On April 28th, around 3 PM, one of the editors was informed by the printer that the Student Government had directed the printer to impound the issue, which had already been printed, and hold it at the printer's shop. The editors later learned that the impoundment had been ordered by Student Government Publication Commissioner Juergen Schnetzer, who wanted the paper held at the printer until the third week of May, after the Spring Election was over. Mr. Schnetzer was a candidate for reelection to Student Government on the Students For Students ("SFS") slate which opposed the Student Union slate endorsed by the *College Voice*.

45. The *College Voice* retained an attorney who informed the Defendants that he was preparing to seek a federal court order to release the impounded newspaper.

46. On April 29, 1997, Student Government met in executive session and, on information and belief, refused to overrule Mr. Schnetzer's order directing the impoundment of the newspaper. Members of the CSI administration

> subsequently overruled the Student Government and ordered the newspaper released. After being impounded for nearly a day, the newspaper was delivered to the campus late in the day on April 29, 1997, only hours before voting in the Spring Election was scheduled to begin on April 30th at 9 AM.

These allegations are insufficient under any of the state action formulations available to bring private individuals within the ambit of Section 1983 liability. *See Archer v. Economic Opportunity Commission of Nassau County, Inc.*, 30 F. Supp. 2d 600 (E.D.N.Y. 1998) (summarizing the various formulations for determining who is a state actor). "Extensive regulation and public funding, either alone or taken together, will not transform a private actor into a state actor; instead, the state must have exerted its coercive power over, or provided significant encouragement to, the defendant before the latter will be deemed a state actor." *Leeds*, 85 F.3d at 54. Thus, that the student publication in *Leeds* was supported by mandatory student activity fees and from food services funds allocated by a student association, was insufficient to establish state action. Similarly, in *Rendell-Baker*, the Supreme Court found an absence of state action even though the private school being sued for retaliatory discharge of the plaintiffs operated with 90% public funding, where "the decisions to discharge the petitioners were not compelled or even influenced by any state regulation." 457 U.S. at 841.

Here, too, mere public funding is not enough where the complaint itself makes clear that the challenged

conduct was neither "compelled or even influenced by" the actions of public actors or bodies. That, as alleged in the complaint, the school authorities immediately revoked the impoundment when they learned of it, tends to belie the claim that the students were acting either on behalf of, or as required by, or even as influenced by, any dictates of the school. Rather, it supports the conclusion that the student defendants' actions were not "fairly attributable to the state."

Plaintiffs argue that *Rosenberger*, 515 U.S. at 819, establishes that the expenditure of money derived from student activity fees by a student government organization is necessarily state action. But in *Rosenberger* the challenge was to a University regulation barring expenditures of student activity fees for "religious organizations." The case did not address actions by students that are not compelled by the State. Thus, although in *Rosenberger* the Student Council denied funding to a religious student newspaper, it did so on the ground that the denial violated a University regulation.

Plaintiffs attempt to distinguish *Leeds* on the ground that the student journalists in *Leeds* "were authorized speakers in a public forum" whose free speech rights were being vindicated. Plaintiffs Surreply p. 11. Plaintiffs thus attempt to avoid the clear holding of *Leeds* that the student defendants were NOT state actors, even though they were the editors of the CUNY law school newspaper, which was supported by mandatory student activity fees. The fallacy of this attempt to avoid the holding of *Leeds* is clear when one recognizes that the Court of Appeals for the Second Circuit has not hesitated to find that

state actors have their own free speech rights. *See, e.g., X-Men Security, Inc. v. Pataki,* 196 F.3d 56, 68-70 (2d Cir. 1999); *Hammerhead Enterprises, Inc. v. Brezenoff,* 707 F.2d 33, 36-37 (2d Cir. 1983), *cert. denied,* 464 U.S. 892 (1983). In *Leeds*, the Circuit did not hold that the student editors were state actors who had the right to reject the advertisement because of their own First Amendment rights. They held that the student government editors were not state actors.

Finally, plaintiffs rely on *Alabama Student Party v. Student Government Association,* 867 F.2d 1344 (11th Cir. 1989), and *Sellman v. Baruch College,* 482 F. Supp. 475 (S.D.N.Y. 1979), for the proposition that student government associations are state actors. The Attorney General argues that these cases are factually distinct. The issue of whether state action exists indeed requires close attention to the specific facts alleged. More importantly, in *Alabama Student Party*, there was no dispute in the Circuit that the defendant Student Government Association was a state actor, so the issue was not litigated. 867 F.2d at 1344-47. *Sellman*, in which the issue was litigated, did find state action in the conduct of a student government association, but it was decided before either *Rendell-Baker* or *Leeds*. The venerable late Judge Edward Weinfeld, in concluding there was state action in *Sellman*, found that the student government was a creature of governmental agencies, that it was funded by mandatory student fees and that the interlocking relationships between the school and the student body taken together were sufficient to attribute the students' actions to the State. Today, given the decisions in such cases as *Rendell-Baker* and *Leeds*, a different analysis of the actual conduct challenged, and its

relationship to the State, is required. As just described, that analysis persuades me that state action cannot be established here.

In the absence of state action, the claims against the student defendants must be dismissed.

CONCLUSION

The plaintiffs' motion for partial summary judgment against Marlene Springer is denied. The CUNY defendants' motion for summary judgment is denied in part and granted in part. The student defendants' motion to dismiss is granted.

In sum, the second, sixth, and eighth causes of action are dismissed in their entirety, and all the claims against defendants CUNY, CSI, the CUNY Board of Trustees, SERC, Goldstein, Reynolds, Alston, Geevarghese, Diaz, Moskowitz, Solomon, Galvez, Joseph Canale, Juergen Schnetzer, Andre Woods, Charlo Almeda, Christopher Alvarez, KellyAnne Biesty, Mary Anne Christensen, and Luis Cruzatte are dismissed.

SO ORDERED.

/s/ NINA GERSHON
United States District Judge

Dated: Brooklyn, New York
March 28, 2002

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 97 CV 2982 (NG)(CLP)

Decided: August 30, 2004
Filed: September 2, 2004
336 F. Supp. 2d 207 (E.D.N.Y. 2004)

SARAH HUSAIN, *et al.*,
Plaintiffs,

-v.-

MARLENE SPRINGER, *et al.*,
Defendants.

OPINION AND ORDER

NINA GERSHON, U.S.D.J.:

The background of this case is set forth in detail in this court's previous order dated March 28, 2002, *see Husain v. Springer,* 193 F. Supp. 2d 664 (E.D.N.Y. 2002), and in the Report and Recommendation of Magistrate Judge Cheryl L. Pollak dated May 1, 2001 ("R&R"). The heart of this case is the plaintiffs' claim that their First Amendment right to free speech was violated by the decision of the president of the College

of Staten Island ("CSI"), a senior college operated by the City University of New York ("CUNY"), to nullify and reschedule a student government election in the Spring term of 1997 based on a finding that a special election issue of the *College Voice*, a student newspaper, endorsing one slate of candidates over another, had improperly influenced the election. Plaintiffs were CSI students in Spring 1997: several were editors or staff on the *College Voice;* several were candidates running for office on the Student Union slate; and one was a student who voted in the Spring 1997 election, but was not associated with either the Student Union or the *College Voice.*

On March 28, 2002, this court dismissed the claims against all the defendants except CSI President Marlene Springer, CSI Vice-President for Student Affairs Carol Jackson, and Michael Silva and Marla Brinson,[1] two former CSI administrative employees, on grounds of Eleventh Amendment immunity. The court denied plaintiffs' motion for summary judgment as to President Springer on the First Amendment claim, finding that further discovery was necessary to determine "whether President Springer's decision was a constitutionally permissible content-based determination designed to confine speech in the student newspaper within the scope of a limited public forum or whether it was a decision based on impermissible viewpoint based discrimination." Discovery is now complete, and plaintiffs once again move for summary judgment against defendant Springer on the First

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[1] The parties later stipulated to dismiss the claims against Marla Brinson.

Amendment claim. At this time the only relief sought is compensatory damages and punitive damages of one dollar against defendants Springer, Jackson and Silva in their individual capacities. Defendants also move for summary judgment on the grounds that there was no First Amendment violation and that they are all entitled to qualified immunity.

Background Facts

The material facts are not disputed. In 1997, the *College Voice* was one of three student newspapers funded primarily by CSI student activity fees. The *College Voice* published articles and editorials on a wide range of topics, including articles on CSI, CUNY, local, national and international affairs, reviews and poetry. The editors of the *College Voice* chose the material that the newspaper published without any supervision or prior review by anyone other than the editors and staff of the newspaper. The *College Voice* was not prohibited from publishing articles and editorials expressing opinions or endorsing candidates in student elections and, in fact, did endorse candidates in Student Government elections. There was no rule or regulation prohibiting or restricting the editors or staff members of the *College Voice* from running for student government positions or from endorsing themselves.

During the Fall 1996 term a number of CSI students concerned about various issues pertaining to student life at CSI and CUNY began meeting and named themselves the "Student Union." The Student Union presented a list of demands to the college administration, including demands for 24 hour access

to the school library and computer center and increased childcare facilities. Several members of the *College Voice* were active in the Student Union. The February 1997 issue of the College Voice published a number of articles and editorials supporting the demands of the Student Union and urging students to join the new organization. It also published articles critical of the incumbent student government and its officers.

The CUNY bylaws require each CUNY college to establish a Student Election Review Committee ("SERC") to approve election procedures and certify results in student elections at CSI. The President of CSI appoints the four-member SERC, which may include students, faculty or administrators at CSI. Any party adversely affected by a decision of the SERC may appeal to the College President who has the final authority regarding certification of student election results and adjudication of complaints and violations of election rules. In Spring 1997, Michael Silva, CSI Assistant Director of Student Life, served as chair of the SERC.

On May 1, 1997, the SERC decided to postpone the student government election, after receiving a complaint from a student candidate from an opposing party that the *College Voice* published a special election issue that contained two pages of platform statements by candidates running on the Student Union slate and an endorsement on the front page encouraging readers to "Vote Student Union!"
Following the SERC's decision, the polls were closed while plaintiffs and other Student Union candidates appealed the decision to CSI President Marlene

Springer, who reopened the polls later that day, but reserved the final decision on the validity of the election until after the completion of voting. The special election issue was distributed throughout the election period. No candidates were disqualified from the election, and no disciplinary action was taken against any student editor or candidate. On May 6, 1997, President Springer affirmed the SERC's decision nullifying the election and scheduled a new election. She explained her decision as follows:

> The *College Voice* inappropriately used student activity fee funds to publish and distribute approximately five thousand copies of a twenty-eight page issue of the *College Voice* with a cover boldly encouraging a vote for a particular slate of candidates, some of whom are also staff members of the *College Voice*. Moreover, much of the issue was substantially devoted to supporting the endorsed slate of candidates. I find that this issue amounted to a thinly veiled student activity fee funded piece of campaign literature for the Student Union slate. As a result, the electoral process was compromised beyond its ability to be fair to all candidates, as argued by other candidates who requested nullification of the election.
>
> The April 30th to May 3rd election is therefore declared null and void, and a new election shall be scheduled for the period Thursday May 8th, 1997 through Friday, May 16, 1997.

The Student Union candidates won all 37 races in

both the canceled election and the rescheduled election.

CSI had adopted Election Rules which candidates must follow in order to be placed on the ballot for a student government election. President Springer stated in her deposition that she relied on two of these Election Rules in effect during the May 1997 elections in making her decision:

> Rule 2. The campus newspapers may not be used as posters on walls, bulletin boards, etc., and may not be used as a means to distribute campaign flyers.
>
> Rule 5. The Student Government will be glad to make you 30 copies of your stamped and approved poster or flyer. All candidates must remove their election materials from the designated areas after the election is over.

These Rules are printed, along with other regulations for candidates, on a form that candidates must sign prior to being placed on the ballot in a student election.

President Springer explained her reliance on these Rules as follows: In her opinion, Rule 2 meant that printing an opinion in a college newspaper favoring one candidate, or slate of candidates, over another would result in an inappropriate use of student activity fees if the "entire issue" was dedicated to only one slate of candidates or if it contained a "blatant" appeal to vote for one slate over the other, even in an

editorial. In her opinion, no violation of the Rules would occur if the coverage was "evenhanded." She based her decision to nullify the election on the fact that student candidates sign an agreement stating that they will receive 30 flyers from the student government free of charge and that the newspapers are not to be used as "campaign literature." Springer Deposition ("Sp. Dep.") at pages 19-29.

President Springer stated that the timing of the issue of the *College Voice* had a bearing on her determination that the material published inside it amounted to campaign literature. *Id.* at 34. She explained that, because it came out during the election, it had the purpose of furthering the Student Union campaign. According to President Springer, if the "Student Union 12-point program for change" had come out several months before the election, whether it was an inappropriate use of student activity fees would depend upon the "context" in which it was published and whether or not the opposing candidates had an opportunity to respond to it. In her opinion, the *College Voice* was not obligated to present both sides of all issues; only student election coverage had to be "balanced" and "honestly present both sides." The *College Voice* could endorse a candidate or party, but should do so in a small editorial rather than as a part of the "whole issue." *Id.* at 37.

President Springer was shown a later issue of the *College Voice*, from May 1998, that contained a back page announcing, "Progressive Student Alliance, Plan of Action;" a full page editorial on page eight which said "The College Voice Endorsement, Vote for the Progressive Student Alliance;" and platform state-

ments on page nine. When asked whether this issue represented a proper use of student activity fees, President Springer said, "I don't know the context of this edition of the College Voice. I don't know when it came out vis-a-vis the elections at hand. I don't know if there were any protests against this, so I have no way of knowing." *Id.* at 43. When asked if this issue was the same sort of campaign literature as the May 1997 issue, or if it presented a more balanced view of the student government election, President Springer said, "Since I have no sense of what the balance would be, since I don't know who was running against these people or what position they were in, it would be extremely difficult to say. As far as I know, I received no complaints from either side on this particular issue." *Id.* at 44. President Springer said that she could not determine whether an edition of the *College Voice* was an inappropriate use of student activity fees unless she could "review the entire document and put it in the context of the election." "I would have to review the contents and the context and have a sense of that." *Id.* at 45.

First Amendment Claim

I turn to the merits of the First Amendment claim before addressing qualified immunity. *See Clue v. Johnson,* 179 F.3d 57, 60 (2d Cir. 1999); *Cf. Mollica v. Volker,* 229 F.3d 366 (2d Cir. 2000).

Although discrimination against speech because of its message is presumed to be unconstitutional, *see Turner Broadcasting System, Inc. v. Federal Communications Commission, et al.,* 512 U.S. 622, 641-43

(1943), where the State creates a limited public forum, it may reserve it for certain groups or for the discussion of certain topics. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, at 829 (1995). "Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set." *Id.* In the context of a limited public forum, then, the State may engage in content discrimination in order to preserve the purposes of the limited public forum and, in doing so, may not only exclude certain groups from participating in the forum, but may also exclude the discussion of certain topics. *Id.* at 829-30. The States's power to restrict speech, however, must not be used to discriminate against speech on the basis of viewpoint and must be reasonable in light of the purpose served by the forum. *Good News Club v. Milford Central School,* 533 U.S. 98, 106-107 (2001).

It is undisputed that the *College Voice* is a limited public forum open to a limited class of speakers consisting of CSI students, and that there are no subject matter restrictions on what the newspaper may publish. In accordance with college and university policy granting editorial autonomy to student publications at CUNY colleges, the student editors determine what articles or advertisements are printed in the College Voice. *See Leeds v. Meltz,* 85 F.3d 51, 54-55 (2d Cir. 1996) (noting that "CUNY did not, and recognized that it could not, control the editorial decisions of student editors" and citing a legal memorandum to the CUNY Council of Presidents, dated January 11, 1995, which "expressly disclaimed any right of the institution to control student publications, such as those financed through student activity fees"). Thus, the restrictions imposed on the limited public

forum here are only that the forum is limited to a certain class of speakers, namely CSI students.

There is also no dispute that the Election Rules do not prohibit student newspapers from publishing editorials concerning elections, nor are they prohibited from printing campaign literature. Nevertheless, although defendants state that there is no dispute as to any material fact, they argue that the Rules *implicitly* define the scope of the content of the campus newspapers. As no reasonable jury could conclude that the Rules are directed at the editorial content of the campus newspapers, that argument is rejected.

The only Rules that President Springer relied on and that defendants say are relevant, Election Rules 2 and 5, define the responsibility of the individual student candidates, not the scope of the content of the college newspapers. Rule 2 simply prohibits inserting flyers into the campus papers as a means of distribution and using the newspapers as a posters [sic]. Rule 5 simply states the number of pre-approved fliers that the student government will print free of charge for each student candidate. The Rules do not, explicitly or even implicitly, preclude campus newspapers from endorsing candidates or running platform statements. There is nothing in the rules concerning "balanced" coverage, the "context" of editorials, or the placement of headlines or platform statements. Indeed, implicit in Rule 2's requirement that candidates should not use the newspapers as posters is the acknowledgment that the papers may contain favorable opinions and support for a candidate that he or she would *want* to post on a bulletin board. That Rule 5 provides that the student government will print and pay for 30

posters or flyers imposes no restriction on the number of issues of the school newspaper which may contain an endorsement. There are simply no written guidelines to establish that what was printed in the May 1997 issue of the *College Voice* was prohibited.

Thus, I find there is no support for the argument that the Election Rules in effect for the 1997 election established the scope of the limited public forum of the *College Voice*, or any other newspaper, or that there were any neutral content-based restrictions established by those Rules. The Election Rules, or even the "spirit" of the Rules that President Springer relied on, do not establish the boundaries and scope of the limited public forum. Nor is there any evidence that President Springer relied on any tradition or established practice as to the campus newspapers' election coverage when she made her decision to nullify the election. *Cf. Hotel Employees & Rest. Employees Union v. City of New York Department of Parks & Recreation,* 311 F.3d 534, 541 (2d Cir. 2002) (relying on the unwritten practice of limiting access to events "having a performance, entertainment or other artistic component" to deny access to a limited public forum for a protest). On the contrary, President Springer acknowledged that it was perfectly appropriate for the college newspapers to take a position with respect to an upcoming election. In light of that, there is no basis other than an improper content-based restriction to say that what the *College Voice* printed was "too much."

The Court in *Rosenberger* explained:

> In determining whether the state is acting to

> preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited public forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

515 U.S. at 829-30. The Court further recognized that "the distinction is not a precise one" because to discriminate based on the viewpoint of a speaker is of necessity a "subset . . . of content discrimination." *Id.* at 831. President Springer did not exclude political statements or platforms as a subject matter, but sought reprisal when a particular viewpoint was being promoted. Thus, it was the viewpoint of the articles that was discriminated against. The viewpoint espoused in the contested issue of the *College Voice* presented a certain perspective on the way the University should be run, and the way that certain students would attempt to guide the University if elected in the upcoming election. It was the aggressive promotion of one perspective over another that was punished, not the printing of political subject matter. According to President Springer, the content of the newspaper would not have violated any Rules had there been no complaints, or had the issue carried as much coverage on the other slate. She relies solely on the amount of the coverage and the one-sided views espoused as the basis for reprisal. But, having opened the forum without restriction, the College President could not constitutionally restrict the newspaper from

printing its views, or force it to print views it did not wish to print.

In sum, in the absence of a finding that the College was merely protecting the scope of the limited public forum, President Springer's decision must be viewed as a viewpoint-based restriction. The issue then is whether President Springer's restrictions were "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Perry Educ. Assn v. Perry Local Educ. Assn.*, 460 U.S. 37, 45 (1983). The defendants, who have hinged their defense of this action on the claim that President Springer was merely preserving the scope of the limited public forum, make no effort to show that her actions were supported by a compelling state interest, or that there were less intrusive alternatives to her decision to nullify the election results. Obviously, assuring the fairness of a student election is an important interest, but there is no evidence to show that her actions were "necessary" to serve that interest or "narrowly drawn to achieve that end."

Defendants argue that plaintiffs suffered no injury and that they are merely asserting a chill which is insufficient to sustain the First Amendment claim. As Magistrate Judge Pollak correctly noted in her Report and Recommendation, although the refusal by a University to provide funding for a school publication based upon the viewpoint of its articles is clearly a form of retaliation under *Rosenberger*, "nothing in that case suggests that other means of discriminating or retaliating against a student newspaper based on the viewpoints expressed therein are not equally actionable." R&R at 19-20. Judge Pollak went on to say that

"while the CUNY defendants' decision to nullify the initial result of the 1997 student government election based upon the content of the *College Voice* election edition did not prevent the dissemination of the views expressed by the editors, the CUNY defendants' actions, in calling for a new election and new voting" alleged an act of retaliation, "placing the election of the Student Union candidates in jeopardy." R&R at 21. Judge Pollak rejected the defendants' effort to dismiss the First Amendment claims on the theory that the cancellation of the election, in the absence of a denial of funding or impoundment of the paper, did not violate the plaintiffs' First Amendment rights. This court agreed with Judge Pollak and refused to dismiss the First Amendment claims. I continue to believe that Judge Pollak was correct. It cannot be that University action taken as a direct result of the views printed in a student newspaper can escape First Amendment scrutiny simply because that action was directed toward the nullification of the goal that the students espoused rather than at the vehicle, the newspaper, in which that goal was promoted. The chill on expressive freedom is the same. As the Supreme Court noted in *Rosenberger:*

> The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, to classify them. The second, and corollary danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that

> is at the center of our intellectual and philosophic tradition . . . The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

515 U.S. at 835-36 (citations omitted).

This is not a case where there is merely a hypothetical threat of reprisal for the publication of substantial election coverage in a college paper, nor a case where no reprisal had yet been felt as a result of expressive activity. Here, there was concrete action taken in nullifying a student election because of a publication supportive of a particular slate of candidates which won the election. The threat or chill that plaintiffs assert that they felt regarding future issues of the newspaper is not merely subjective, but has already been experienced.[2] It is clear that "constitutional violations may arise from the deterrent or 'chilling' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *See Laird v. Tatum,* 408 U.S. 1, 11 (1972); *accord Hankard v. Town of Avon,* 126 F.3d 418, 423 (2d. Cir. 1997). That is what occurred here.

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[2] *See* R&R at 20, fn. 12.

In sum, I find that President Springer's actions resulted in a denial of plaintiffs' First Amendment right to be free from reprisals based upon the content of the articles that were published in the *College Voice.*

Jackson and Silva

Defendants claim that Carol Jackson, Vice-President for Student Affairs, and Michael Silva, CSI Assistant Director of Student Life, were not responsible for President Springer's decision and cannot be held liable for any resulting violation that stemmed from it. The students complained to the SERC, and that committee voted to postpone the elections until a later time. President Springer's decision was the result of an appeal of that decision. Although Jackson and Silva may have advised her on how to proceed, her decision was an intervening step between any actions on their part and the resulting harm to plaintiffs. *See e.g. Taylor v. Brentwood Union Free School District,* 143 F.3d 679, 686-88 (2d Cir. 1998); *Jeffries v. Harleston,* 52 F.3d 9, 14-15 (2d Cir. 1995). Thus, I agree that Jackson and Silva cannot be held liable under Section 1983.

Qualified Immunity

Having determined that President Springer's actions violated plaintiffs' First Amendment rights, I must now address whether she has qualified immunity. All defendants argue that, even if their actions violated the constitution, under *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982), they are entitled to qualified immunity because their conduct did not violate clearly

established statutory or constitutional rights of which a reasonable person would have known.

"The defense of qualified immunity shields government officials from liability if the official's conduct did not violate constitutional rights that were clearly established at the pertinent time or if it was objectively reasonable for the official to believe that the conduct did not violate such rights." *Clue v. Johnson,* 179 F.3d 57, 61 (2d Cir. 1999). There are three factors to consider when determining whether qualified immunity applies: (1) whether the right in question was defined with reasonable specificity; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful. *Id.; See also Mollica,* 229 F.3d 366 at 371 (2d Cir. 2000).

While I find that it was clearly established in 1997 that, in the absence of reasonable limitations on the scope of the limited public forum, college newspapers had the right to print election-related coverage without retribution, it was not yet clearly established that nullifying and rescheduling the student government election that was the subject of that coverage was an impermissible retribution for that expression. That is, it was not established with sufficient specificity that canceling a student government election, as opposed to impounding the newspaper, denying funding, or directly disciplining students, would constitute an actionable form of reprisal against them. While I so hold today, no case had so held at the time President Springer acted.

> For a constitutional right to be "clearly established" for purposes of determining whether an officer is entitled to qualified immunity, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that *in light of pre-existing law the unlawfulness must be apparent.*

Mollica, 229 F.3d 366 at 370-71 (emphasis added in *Mollica*) (*quoting Anderson v. Creighton,* 483 U.S. 635, 638 (1987)). In this case I cannot conclude that a reasonable official in President Springer's position would have understood that her acts were unlawful. Thus, the defendants are protected by qualified immunity.

CONCLUSION

For the reasons stated above, defendants' motion for summary judgment on the basis of qualified immunity is granted. The Clerk of Court is directed to enter summary judgment for all defendants.

SO ORDERED.

/s/ NINA GERSHON
United States District Judge

Dated: Brooklyn, New York
August 30, 2004

APPENDIX D

PROVISIONS OF THE UNITED STATES CONSTITUTION

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

AMENDMENT 14
SECTIONS 1 and 5

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

5. The Congress shall have power to enforce this article by appropriate legislation.

APPENDIX E

FEDERAL AND STATE STATUTES

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * * *

NEW YORK STATE EDUCATION LAW §6206[7][a]

The board of trustees shall establish positions, departments, divisions and faculties; appoint and in accordance with the provisions of law fix salaries of instructional and non-instructional employees therein; establish and conduct courses and curricula; prescribe

conditions of student admission, attendance and discharge; and shall have the power to determine in its discretion whether tuition shall be charged and to regulate tuition charges, and other instructional and non-instructional fees and other fees and charges at the educational units of the city university. The trustees shall not impose a differential tuition charge based upon need or income. All students enrolled in programs leading to like degrees at the senior colleges shall be charged a uniform rate of tuition, except for differential tuition rates based on state residency. The trustees shall not adopt changes in tuition charges prior to the enactment of the annual budget. The board of trustees may accept as partial reimbursement for the education of veterans of the armed forces of the United States who are otherwise qualified such sums as may be authorized by federal legislation to be paid for such education. The board of trustees may conduct on a fee basis extension courses and courses for adult education appropriate to the field of higher education. In all courses and courses of study it may, in its discretion, require students to pay library, laboratory, locker, breakage and other instructional and non-instructional fees and meet the cost of books and consumable supplies. In addition to the foregoing fees and charges, the board of trustees may impose and collect fees and charges for student government and other student activities and receive and expend them as agent or trustee.

N.Y. EDUC. Law §6206[7][a] (Mckinney's Consolidated Laws of New York, *1998 Pocket Part) (As amended* New York Laws 1995, *Ch. 344, §1) This is the version of §6206[7][a] in effect during the events alleged in the Third Amended Complaint to have occurred during*

April and May of 1997. Section 6206[7][a] was subsequently amended by New York Laws 2002, *Ch. 327, §2 to insert additional language pertaining to tuition charges. All the language in the 1995 version of §6206[7] was retained and no change was made to the final sentence pertaining to the collection of mandatory fees to support student government and other student activities.*

APPENDIX F

CITY UNIVERSITY OF NEW YORK BOARD OF TRUSTEES BY-LAWS (SELECTED PROVISIONS)

BYLAW 15.1
CONDUCT STANDARD DEFINED

Each student enrolled or in attendance in any college, school or unit under the control of the board and every student organization, association, publication, club or chapter shall obey the laws of the city, state and nation, and the bylaws and resolutions of the board, and the policies, regulations, and orders of the college.

The faculty and student body at each college shall share equally the responsibility and the power to establish, subject to the approval of the board, more detailed rules of conduct and regulations in conformity with the general requirement of this article.

This regulatory power is limited by the right of students to the freedoms of speech, press, assembly and petition as applied to others in the academic community and to citizens generally.

BYLAW 15.2
STUDENT ORGANIZATIONS.

a. Any group of students may form an organization, association, club or chapter by filing with the duly elected student government organization of the college

or school at which they are enrolled or in attendance and with an officer to be designated by the faculty of the college or school at which they are enrolled or in attendance (1) the name and purposes of the organization, association, club or chapter, (2) the names and addresses of its president and secretary or other officers corresponding in function to president and secretary.

However, no group, organization or student publication with a program against the religion, race, ethnic origin or identification or sex of a particular group or which makes systematic attacks against the religion, race, ethnic origin or sex of a particular group shall receive support from any fees collected by the college or be permitted to organize or continue at any college or school. No organizations, military or semi-military in character, not connected with established college or school courses, shall be permitted without the authorization of the faculty and the duly elected student government and the board.

b. Extra-curricular activities at each college or school shall be regulated by the duly elected student government organization to insure the effective conduct of such college or school as an institution of higher learning and for the prevention of activities which are hereafter proscribed or which violate the standards of conduct of the character set forth in bylaw 15.1. Such powers shall include:

1. The power to charter or otherwise authorize teams (excluding intercollegiate athletics), publications, organizations, associations, clubs or chapters, and, when appropriate in the

exercise of such regulatory power, the power to refuse, suspend or revoke any charter or other authorization for cause after hearing on notice.

2. The power to delegate responsibility for the effective implementation of its regulatory functions hereunder to any officer or committee which it may appoint. Any aggrieved student or group whose charter or other authorization has been refused, suspended or revoked may appeal such adverse action by such officer or committee of student government to the duly elected student government. On appeal an aggrieved student or group shall be entitled to a hearing following the due process procedures as set forth in section 15.3. Following such hearing the duly elected student government shall have the authority to set aside, decrease or confirm the adverse action.

c. Any person or organization affiliated with the college may file charges with an office of the dean of students alleging that a student publication has systematically attacked the religion, race, ethnic origin or sex of a particular group, or has otherwise contravened the laws of the city, state or nation, or any bylaw or resolution of the board, or any policy, regulation or order of the college, within a reasonable period of time after such occurrence. If the dean of students determines, after making such inquiries as he/she may deem appropriate, that the charges are substantial, he/she shall attempt to resolve the dispute, failing which he/she shall promptly submit the charges to the faculty-student disciplinary committee for disposition in accordance with the due

process procedures of section 15.3. thereof.

If the committee sustains the charges or any part thereof against the student publication, the committee shall be empowered to (1) reprimand the publication, or (2) recommend to the appropriate funding bodies the withdrawal of budget funds. The funding body shall have the authority to implement fully, modify or overrule the recommendations.

d. Each college shall establish a student elections review committee in consultation with the various student governments. The student elections review committee shall approve the election procedures and certify the results of elections for student governments, and student body referenda.

e. Student government elections shall be scheduled and conducted, and newly elected student governments shall take office, in accordance with policies of the board, and implementing regulations.

* * * *

BYLAW 16.1
STUDENT ACTIVITY FEE.

The student activity fee is the total of the fees for student government and other student activities. Student activity fees, including student government fees collected by a college of the university shall be deposited in a college central depository and, except where earmarked by the board, allocated by a college association budget committee subject to review by the college association as required in these bylaws.

BYLAW 16.2
STUDENT ACTIVITY FEES USE-EXPENDITURE CRITERIA.

Student activity fee funds shall be allocated and expended only for the following purposes:

1. Extracurricular educational programs;.
2. Cultural and social activities;
3. Recreational and athletic programs;
4. Student government;
5. Publications and other media;
6. Assistance to registered student organizations;
7. Community service programs;
8. Enhancement of the college and university environment;
9. Transportation, administration and insurance related to the implementation of these activities;
10. Student services to supplement or add to those provided by the university;
11. Stipends to student leaders.

BYLAW 16.3
STUDENT GOVERNMENT FEE.

The student government fee is that portion of the student activity fee levied by resolution of the board which has been established for the support of student government activities. The existing student government fees now in effect shall continue until changed. Student government fees shall be allocated by the duly elected student government, or each student government where more than one duly elected student

government exists, for its own use and for the use of student organizations, as specified in section 15.2. of these bylaws, provided, however, that the allocation is based on a budget approved by the duly elected student government after notice and hearing, subject to the review of the college association. Where more than one duly elected student government exists, the college association shall apportion the student government fees to each student government in direct proportion to the amount collected from members of each student government.

BYLAW 16.4
STUDENT GOVERNMENT ACTIVITY DEFINED

a. A student government activity is any activity operated by and for the students enrolled at any unit of the university provided, (1) such activity is for the direct benefit of students enrolled at the college, (2) that participation in the activity and the benefit thereof is available to all students enrolled in the unit or student government thereof, and (3) that the activity does not contravene the laws of the city, state or nation, or the published rules, regulations, and orders of the university or the duly established college authorities.

[there is no section b.]

BYLAW 16.5
COLLEGE ASSOCIATION

a. The college association shall have responsibility for the supervision and review over college student activity fee supported budgets. All budgets of college student activity fees, except where earmarked by the board to be allocated by another body, should be developed by a college association budget committee and recommended to the college association for review by the college association prior to expenditure. The college association shall review all college student activity fee, including student government fee allocations and expenditures for conformance with the expenditure categories defined in Section 16.2. of this article and the college association shall disapprove any allocation or expenditure it finds does not so conform, or is inappropriate, improper, or inequitable.

b. A college association shall be considered approved for purposes of this article if it consists of thirteen (13) members, its governing documents are approved by the college president and the following requirement are met:

1.The governing board of the college association is composed of:

(i) The college president or his/her designee as chair.

(ii) Three administrative members appointed by the college president.

(iii) Three faculty members appointed by the college president from a panel whose size

is twice the number of seats to be filled and the panel is elected by the appropriate college faculty governance body.

(iv) Six student members comprised of the student government president(s) and other elected students with the student seats allocated on a basis which will provide representation to each government, where more than one exists, as nearly as practicable in proportion to the student activity fees provided by the students from the respective constituencies.

2. The college association structure provides a budget committee composed of members of the governing board, at least a majority of whom are students selected in accordance with section 16.5.(b)(1)(iv) of these bylaws. The budget committee shall be empowered to receive and review student activity fee budget requests and to develop a budget subject to the review of the college association. The college association may choose to not approve the budget or portions of the budget if in their opinion such items are inappropriate, improper, or inequitable. The budget shall be returned to the budget committee with the specific concerns of the college association noted for further deliberation by the budget committee and subsequent resubmittal to the college association. If the budget is not approved within thirty (30) days those portions of the budget voted upon and approved by the college association board will be allocated. The remainder shall be held until the college association and the budget committee agree.

3. The governing documents of the college association have been reviewed by the board's general counsel and approved by the board.

BYLAW 16.6
MANAGEMENT AND DISBURSEMENT OF FUNDS

The college and all student activity fee allocating bodies shall employ generally accepted accounting and investment procedures in the management of all funds. All funds for the support of student activities are to be disbursed only in accordance with approved budgets and be based on written documentation. A requisition for disbursement of funds must contain two signatures; one, the signature of a person with responsibility for the program; the other the signature of an approved representative of the allocating body.

BYLAW 16.7
REVENUES

All revenues generated by student activities funded through student activity fees shall be placed in a college central depository subject to the control of the allocating body. The application of such revenues to the account of the income generating organization shall require the specific authorization of the allocating body.

BYLAW 16.8
FISCAL ACCOUNTABILITY HANDBOOK

The chancellor or his/her designee shall promulgate regulations in a fiscal accountability handbook, to regulate all aspects of the collection, deposit, financial disclosure, accounting procedures, financial payments, documentation, contracts, travel vouchers, investments and surpluses of student activity fees and all other procedural and documentary aspects necessary, as determined by the chancellor or his/her designee to protect the integrity and accountability of all student activity fee funds.

* * * *

BYLAW 16.11 (Excerpts)
THE REVIEW AUTHORITY OF COLLEGE PRESIDENTS OVER STUDENT ACTIVITY FEE ALLOCATING BODIES AND AUXILIARY ENTERPRISE BOARDS

a. The president of the college shall have the authority to disapprove any student activity fee, including student government fee, or auxiliary enterprise allocation or expenditure, which in his or her opinion contravenes the laws of the city, state, or nation or any bylaw or policy of the university or any policy, regulation, or order of the college. If the college president chooses to disapprove an allocation or expenditure, he or she shall consult with the general counsel and vice chancellor for legal affairs and thereafter communicate his/her decision to the allocating body or auxiliary enterprise board.

b. The president of the college shall have the authority to suspend and send back for further review any student activity fee, including student government fee, allocation or expenditure which in his or her opinion is not within the expenditure categories defined in section 16.2. of this article. The college association shall, within ten (10) days of receiving a proposed allocation or expenditure for further review, study it and make a recommendation to the president with respect to it. The college president shall thereafter consider the recommendation, shall consult with the general counsel and vice chancellor for legal affairs, and thereafter communicate his/her final decision to the allocating body as to whether the allocation or expenditure is disapproved.

* * * *

BYLAW 16.12
REFERENDA

A referendum proposing changes in the student activity fee shall be initiated by a petition of at least ten (10) percent of the appropriate student body and voted upon in conjunction with student government elections.

a. Where a referendum seeks to earmark student activity fees for a specific purpose or organization without changing the total student activity fee, the results of the referendum shall be sent to the college association for implementation.

b. Where a referendum seeks to earmark student activity fees for a specific purpose or organization by

changing the total student activity fee, the results of such referendum shall be sent to the board by the president of the college together with his/her recommendation.

c. At the initiation of a petition of at least ten (10) percent of the appropriate student body, the college president may schedule a student referendum at a convenient time other than in conjunction with student government elections.

d. Where the referendum seeks to affect the use or amount of student activity fees in the college purposes fund, the results of the referendum shall be sent to the board by the college president together with his/her recommendation.

* * * *

APPENDIX G

Excerpts from College Of Staten Island Governance Plan

ARTICLE VII - CONSTITUTION OF THE STUDENT GOVERNMENT

Section 1. Guiding Principle
The College of Staten Island of The City University of New York hereby establishes the Student Government of the College in accordance with Article XV of the Bylaws of the Board of Trustees, which enumerates the principles and procedures governing the rights, conduct, and organizations of students. As formulators of this constitution, we impose our intention upon all officers charged with its enforcement: that they shall govern impartially and grant funds and services equitably to all qualified students under the aegis of the College.

Section 2. Name
The responsibility for government shall be entrusted to one body, the Student Senate.

Section 3. Eligibility for Franchise and for Office
All students who pay their student activity fee shall be eligible to vote. All voters in good academic standing and with at least 2.0 grade-point average shall be eligible for nomination and for office. If at any time the grade-point average of a student elected to the Senate falls below 2.0, said student will be automatically dropped from the Senate.

Section 4. Student Senate
a) Membership
The Student Senate shall be composed of 20 representatives as follows:

1) One representative from each academic class (i.e., one freshman, one sophomore, one junior, one senior and one graduate student). Freshmen must have completed at least twelve credits to be eligible to run for office;
2) Five at-large students from the junior and senior classes of the college;
3) Ten at-large students from the freshman and sophomore classes of the college. The percentages of students enrolled in each of the four classes shall be verified every four years to ensure that the above representation is accurate. If the representation is not accurate, the Student Senate must present a system of adjusted representation at the next annual election for vote of the entire student body.

b) Elections
An annual election shall be held by the first week of May. A special election to fill vacancies shall be held by the last week in October. Subsequent vacancies shall be filled by a majority vote of the Senators currently serving on the Senate after a minimum of one week's appropriate public notice.

c) Terms of Office
Senators elected in the annual election shall hold office for the next academic year beginning with the first Senate meeting of the following September.

Senators elected by special election shall hold office

for the remainder of the academic year. The term of office for all senators shall automatically expire upon graduation, withdrawal, or dismissal from the college. Any Senator absent from three consecutive regular or six total meetings of the Senate during the academic year shall be automatically removed from office.

d) Meetings

1) *Regular Meetings.* The Senate shall hold regular meetings during the first and second weeks of the fall semester and at least every second week thereafter, and during the first and second weeks of the spring semester and at least every second week thereafter, except upon waiver by two-thirds of the Senate.

2) *Special Meetings.* Special meetings may be called by the President of the Senate, or by a petition signed by one-third of the Senate, or by a petition signed by 5% of the student body. Special meetings are defined as one at which one item of business is discussed. Notification of such meetings must be made in writing to all Senators at least three days prior to such a meeting.

3) *Annual Meeting.* The annual meeting shall be held at the end of the spring term for the purpose of accepting annual reports. The President of the Senate shall be responsible for convening this meeting.

4) *Quorum.* One-half plus one of the total senators currently serving shall constitute a quorum.

5) *Parliamentary Rules.* Procedures shall accord with ROBERT'S RULES OF ORDER, NEWLY REVISED, except when inconsistent with this Constitution, Article XV of the Bylaws of the Board of Trustees and the laws of the City, State and Nation.

e) Duties and Responsibilities

The Student Senate shall:

1) Elect the President of the Senate and the chairpersons of its commissions;

2) Approve commission memberships;

3) Consider disciplinary action against any officer, Senator, commission member, or any other person responsible to and under the jurisdiction of the Senate, on receipt of formal written charges by the Senate. (The Senate must act on the charges within ten days of receipt. ROBERT'S RULES OF ORDER, NEWLY REVISED shall prevail at hearings or trials);

4) Advise and inform the student body, the faculty, and the administration on pertinent matters;

5) Investigate and act on any matter affecting the general welfare of the student body;

6) Direct the President of the Senate as to the implementation of any measure enacted by the Senate;

7) Refer any pertinent matter to a referendum of the student body;

8) Call meetings of the student body, pursuant to Section 4 of this Constitution;

9) Remove from office any Senator who has missed three consecutive regular or a total of six meetings during the academic year;

10) Determine the disposition of the Student Government portion of the student activity fee, such portion known as the: Student Government activity fee, pursuant to Article XV of the Bylaws of the Board of Trustees which provides for a public hearing;

11) Charter or otherwise authorize teams (excluding Intercollegiate), publications, organizations, associations, clubs or chapters, and refuse, suspend, or revoke any charter or authorization for cause after a hearing;

12) Delegate responsibility for the implementation of its regulatory functions hereunder to any officer or committee it may appoint;
13) Interpret this Constitution by majority vote of its total currently serving membership;
14) Elect, from its number, a deputy for the president, should the president be absent from a meeting.

Section 5. President of the Senate
a) Election and Term of Office
The Senate shall elect, from its number, a President who shall serve for one academic year. The election process for president shall begin at the first meeting of the Senate. A two-thirds vote of those Senators present shall be required for election. If difficulties arise in the election of a president, the chair will rotate on an alphabetical basis until a president is elected. Upon resignation, dismissal, or incapacitation of the president, a new election shall be held immediately, the new president serving until the end of the academic year.

b) Duties and Responsibilities
The President of the Senate shall:

1) Preside over meetings of the Senate;
2) Serve as chairperson of the Commission on Academic and Curricular Affairs;
3) Prepare the agenda for meetings of the Senate;
4) Implement measures enacted by the Senate and submit periodic progress reports;
5) Preside over meetings of the student body;
6) Represent the student body at official functions;
7) Represent the student body in the College Council either directly or through a designee.

Section 6. Commissioners
The Senate shall elect one of its number as chairperson of each of eight standing commissions charged with drafting legislation for consideration by the Senate and recommending methods of implementing such legislation. Each Commissioner shall appoint additional members, such appointments being subject to the approval of the Senate.

The Commissions are as follows:

Commission on Finances,
Commission on Clubs and Organizations.
Commission on Student Center,
Commission on Student Services,
Commission on Publications,
Commission on Academic and Curricular Affairs,
Commission on Elections,
Commission on Part-Time Students.

a) Election and Term of Office
Only Senators shall be eligible to serve as Commissioners. The election process for Commissioners shall begin at the first meeting in September. Commissioners will be elected by majority vote of the Senators present and shall serve for a term of one academic year.

b) Duties and Responsibilities
The Commissioners shall:

1) Submit to the Senate a written description of the commission's organization, budget, and operating procedure, for approval, within two weeks of the election of the Commissioner;

2) Report periodically to the Senate on the operation of the commission;
3) Deposit, record, and maintain the commission's funds in conformity with the accounting procedure of the College of Staten Island Association, Inc.;
4) Recommend commission membership, which may comprise no more than two Senators, in addition to the Commissioner, to the Senate for approval;
5) Submit reports monthly on the finances and activities of the commission.

Section 7. Meetings of the Student Body
The Senate may call discretionary meetings of the student body to inform the students of actions taken by the Senate, to discuss other pertinent matters, and to solicit student opinion. Motions passed at such meetings shall be considered resolutions advising the Senate without binding effect.

Section 8. Representatives on Other Bodies
At the annual election to to [sic] held by the first week in May, student representatives shall be elected to serve on the following bodies:

a) College Council,
b) Faculty-Student Disciplinary Committee,
c) Auxiliary Services Corporation,
d) CSI Association.

ARTICLE VIII - GOVERNANCE REVIEW AND AMENDMENTS (Excerpt)

* * * *

Section 3. Amendments to Article VII
Amendments to Article VII (Constitution of the Student Government) may be proposed by:

a) a majority of the Senators present at a meeting of the Senate, or
b) a petition containing the signatures of 10% of the student body.

An amendment shall be adopted when approved by majority vote of the student body in referendum, provided that at least 15% of the student body vote, by the President and by the Board of Trustees.

* * * * * *

As amended at City University of New York Board of Trustees Meetings - October 26, 1981; January 26, 1987; June 29, 1987 and February 26, 1990.

APPENDIX H

Citations to Reports of Alleged Instances Of Censorship or Viewpoint Based Reprisals Against Student Publications by Public College Student Governments

(Reported by the Student Press Law Center (SPLC) and available on the SPLC website at www.splc.org last visited December 4, 2007)

University of Missouri at Rolla (2007):
Missouri Newspaper Threatens University With Lawsuit To Restore Funding - Student Legislature Voted To Cut $10,000 From University Of Missouri At Rolla Student Newspaper (Student Press Law Center, February 14, 2007) *http://www.splc.org/newsflash.asp?id=1440&year=2007*

Montclair State University (2007):
Montclair State Editor Says He Wants Newspaper's Financial Independence (Student Press Law Center, February 12, 2007) *http://www.splc.org/newsflash_archives.asp?id=1436&year=2007*

Univ. of California - Santa Barbara (2007):
Student Government Cuts Off Funds To Paper At UC-Santa Barbara (Student Press Law Center, January 19, 2007) *http://www.splc.org/newsflash_archives.asp?id=1406&year=2007*

Grambling State University (2007):
Grambling State Journalists Denied Multiple Passes To Homecoming Events, Editor Says (Student Press

Law Center, November 21, 2006) *http://www.splc.org/newsflash_archives.asp?id=1376&year=2006*

Florida Atlantic University (2006):
Florida Atlantic President Sends Letter To Student Government Following Action Against Radio Station (Student Press Law Center, October 12, 2006) *http://www.splc.org/newsflash_archives.asp?id=1350&year=2006* . *See also*, *Student Government's Funding Cuts Jeopardize Paper's Future* (Student Press Law Center, Fall 2006) (Scroll down to sixth story on page) *http://www.splc.org/report_detail.asp?id=1303&edition=40*

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Student government's attempt to force newspaper to run column failed (2005 Student Press Law Center, September 29, 2005) *http://www.splc.org/newsflash.asp?id=1081&year=2005*

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Student Officials At N.Y. College Lock Student Journalists Out Of Newsroom (Student Press Law Center, June 14, 2005) *http://www.splc.org/newsflash.asp?id=1027&year=2005*

SUNY Buffalo (2004):
After Conflict, Senators Cut Funding To Paper (Student Press Law Center, 2004) *http://www.splc.org/report_detail.asp?edition=37&id=1128*
See also, The Heat Is On - When Student Government Dictates Funding, Student Journalists Feel Heat - And Struggle To Retain Editorial Control (Student Press Law Center, 2004) *http://www.splc.org/report_detail.asp?edition=16&id=1187*
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University of Northern Colorado (2001):
Council Guts Funding For Newspaper - Mirror*: Cuts Reflect Student Government's Desire To Punish Staff* (Student Press Law Center, 2001) *http://www.splc.org/report_detail.asp?edition=0&id=718*
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Kean University
University of Connecticut at Storrs
(compilation article) (1997):
Students Censor Students - Campus Leaders Use Funds To Attack The Campus Press (Student Press Law Center, 1997) *http://www.splc.org/report_detail.asp?edition=29&id=187*
(Last visited December 4, 2007)

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 97 CV 2982 (NG)(CLP)

Decided: February 8, 2000
Filed: February 15, 2000

SARAH HUSAIN, *et al.*,
Plaintiffs,

-v.-

MARLENE SPRINGER, *et al.*,
Defendants.

REPORT AND RECOMMENDATION

CHERYL L. POLLAK, U.S.M.J.:

On May 27, 1997, students at the City University of New York ("CUNY"), College of Staten Island ("CSI"), filed this action against defendants CUNY, CSI, the Student Election Review Committee of CSI ("SERC"), the Board of Trustees of CUNY, various named members of the CSI and CUNY administrations (collectively, the "CUNY defendants"), and various individually named CSI students. The complaint alleged that plaintiffs' rights under the First Amend-

ment had been violated when CSI and CUNY officials cancelled the results of the student election, in which certain of the plaintiffs were candidates, because a student newspaper issued an endorsement for a particular slate of candidates running in the election. Plaintiffs' initial complaint sought a declaratory judgment and damages from the CUNY defendants pursuant to 42 U.S.C. § 1983 and the New York State Open Meetings Law, N.Y. Pub. Off. Law § 100 *et seq.* (McKinney 1988, 1998 Supp.). In addition, plaintiffs sought declaratory relief and minimal damages from students who were members of the incumbent CSI student government in the spring of 1997 (the "student defendants"), based on plaintiffs' allegations that the student defendants violated Plaintiffs' First Amendment rights by impounding the edition of the student newspaper that carried the endorsement.

On November 1, 1999, plaintiffs filed a motion for a preliminary injunction to prevent the CUNY defendants from prohibiting plaintiffs from publishing endorsements of candidates in future student government elections at CSI or any other college or from taking reprisals against plaintiffs, including cancellation of any election results, for publishing such endorsements. That motion was referred to the undersigned to prepare a Report and Recommendation.[1]

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[1] Also currently pending before this Court for Report and Recommendation are defendants' motion to dismiss, plaintiffs' motion for summary judgment, and plaintiffs' motion to file a third amended complaint. Those motions will be dealt with in a separate Report and Recommendation.

FACTUAL BACKGROUND

The following facts are derived from the testimony presented at the preliminary injunction hearing held on January 28, 2000, and the affidavits and documents submitted in connection with the preliminary injunction motion.

Pursuant to Article VII, Section 1 of the Governance Plan of CSI, CSI provides for the establishment of a student government. This student government operates under the auspices of the CUNY Board of Trustees and is delegated certain powers by the Board. *See* Article XV §§ 15.2(a), 15.2(b) of the Bylaws of the CUNY Board of Trustees. Every spring, elections are held to determine the members of the student government for the following year. In accordance with its Bylaws, the CUNY Board is charged with the responsibility of overseeing and conducting the student government elections at each of the CUNY colleges. *See* Article XV §§ 15.2(d), 15.2(e) of the Bylaws of the CUNY Board of Trustees. In furtherance of that responsibility, the Board of Trustees has established a Student Election Review Committee at each college to act as "an impartial review panel" to review and approve student government election procedures and to certify the results of the student government elections. (CSI Student Advisory Mem. No. 2, Aug. 1, 1990, Ex. B to Decl. of Steven L. Banks, dated Dec. 24, 1999 ("Banks Decl.")). The members of the SERC, although appointed by the College President, are nominated by the student government bodies and may include students, faculty, and administrative staff members. (*Id.*) Any student challenging the conduct or fairness of any student election may petition the

SERC for review and the decisions of the SERC are appealable to the College President. (*Id.*)

In the spring of 1997, plaintiffs Sarah Husain, Devon Blinth, Colleen McGraham, Jeff McGraham, Kathleen McHugh, Neil Schuldiner, and William Wharton were running as candidates for the 1997-98 CSI student government as part of a slate of candidates calling themselves the "Student Union." In addition to running as candidates for student government, plaintiffs were contributors to and editors of the *College Voice*, a CSI student newspaper funded in part by student activities fees collected from each CSI student.

The May 1997 issue of the *College Voice*, which was scheduled for publication two days prior to the commencement of voting for the student government elections on April 30, 1997, contained the platform statements of twenty four Student Union candidates, including Blinth, C. McGraham, McHugh, Schuldiner, and Wharton, along with an editorial that appeared on the second page of the issue endorsing Student Union candidates for 37 positions. The front page of the newspaper carried an endorsement encouraging readers of the paper to "Vote Student Union!" and the "12-Pt. Program for Change" advocated by the Student Union slate was printed on the back cover of the issue. The newspaper also contained various stories and reports about the election, as well as articles on other issues related to CSI, CUNY, and world and national events.[2] (Jan. 28, 2000 Hearing, Pls.' Ex. 2).

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[2] *See* n.3 *infra*.

Although the *College Voice* issue did not contain any platform statements of non-Student Union candidates, plaintiffs contend that those candidates running against the Student Union slate submitted their statements for publication to the *Banner*, another CSI student newspaper, and did not submit any statements to the *College Voice*. (Wharton Aff., Oct. 26, 1999, ¶ 8; Jan. 28, 2000 Hearing Transcript ("Hrg. Tr.") at 55).[3] Indeed, the testimony at the preliminary injunction hearing was that because the *Banner* was designated as the "official" CSI newspaper, it was required by certain CSI regulations to print the platform statements of all candidates running for student government. (Hrg. Tr. at 54). There is no dispute that this requirement did *not* apply to the *College Voice*.[4] (*Id.* at 55).

On April 28, 1997, the day the *College Voice* election issue was to be distributed on campus, the editors of the paper learned that this issue of the *College Voice* had been held at the printer and was not going to be delivered to campus on that date as expected. Plain-

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[3] Mr. Canale testified that in the three years that he ran for student government prior to this election, the *College Voice* did not, as a matter of practice, run student platform statements. (Hrg. Tr. at 83).

[4] Indeed, the testimony of Mr. Wharton was that the *College Voice* had previously been the "official" CSI newspaper, but that the student government, under Mr. Canale's leadership, had voted to revoke that designation and instead designated the *Banner* as the official paper. (Hrg. Tr. at 54). Mr. Canale's testimony was that the official designation was withdrawn from the *College Voice* because it failed to focus on issues relating to CSI. (*Id.* at 109, 113-16).

tiffs believed that members of the incumbent student government, many of whom were running against the Student Union candidates, had directed the printer to impound the issue of the *College Voice* until after the voting was completed. (Am. Compl. ¶ 40). However, according to the testimony of *pro se* defendant Juergen Schnetzer, who was the student government's Commissioner of Publications at the time, the paper was originally held because there was some concern on the part of the printer that the printer would not be paid for this issue because this was the second issue printed in April and the *College Voice* was only supposed to be a monthly publication. Schnetzer testified that despite recommendations from various members of the CSI administration and the exhortations of the *College Voice* editors, he did not immediately order the release of the issue, but instead tried to schedule a meeting of the student government's Publications Commission to discuss the funding issue. At the same time, according to Joseph Canale, then President of the CSI student government, the student government also met in executive session to address the question of releasing the *College Voice* issue, but no consensus was apparently reached.[5] While the Commission and the student government were considering their various options, the editors of the *College Voice* retained an attorney who threatened to seek an injunction unless the paper was immediately released. On April 29, 1997, the CSI administration learned of the impoundment and ordered the issue to be released

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[5] Both Canale and Schnetzer were running for reelection on the "Students For Students" slate that was running against the Student Union slate.

immediately.[6] The paper was thereafter delivered to campus a day late and only hours before the voting was scheduled to begin on April 30, 1997. (Am. Compl. ¶ 42).

On April 30, 1997, Andre Woods, a CSI student and an incumbent member of the 1996-97 CSI student government running against the Student Union slate, filed a complaint with the CSI SERC seeking to disqualify any candidate "found in that aforementioned issue of the *College Voice* by any means such as [p]latform [s]tatement or otherwise." (Banks Decl., Ex. A). Specifically, Woods, as the "Elections Commissioner" on the student government, claimed that the use of a school newspaper funded by student activity fees to endorse student government candidates violated the Electoral Rules Governing Candidates, severely prejudiced the non-Student Union candidates, and compromised the fairness of the election. (*Id.*)

On April 30, 1997, the CSI. SERC, composed of one non-voting college administrator, CSI students, and a non-management college employee, reviewed Woods' complaint and heard arguments from both Woods and Colleen McGraham. (Banks Decl., Ex. C). The SERC concluded that "Rule #2 of the Electoral Rules Governing Candidates was not broken" and, thus, they voted not to sustain Woods' complaint. (*Id.*) The SERC also approved a finding that "the *College Voice* used student activity fee funds allocated to promote the

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[6] From the papers submitted by the CUNY defendants, it does not appear that the question of the timing of this issue or funding for this issue played a role in the administration's decision to cancel the election results.

election of particular candidates affiliated with the *College Voice*." (*Id.*)

The following day, May 1, 1997, the SERC met again in response to requests by the Student Union candidates to be heard. After hearing statements from defendants Woods and Charlo Almeda; from plaintiffs Wharton, Husain, Colleen McGraham, and Devon Blinth; and from a non-party, Christopher Dennis, the SERC moved into executive session. (Banks Decl., Ex. D). At the conclusion of the executive session, the SERC voted not to sustain Woods' complaint to the extent that he sought to disqualify the candidates endorsed by the *College Voice*, but it did vote to postpone the election until a later date, ruling that the votes that had been cast were rendered "null and void" by the SERC's conclusion that "the electoral process had been compromised beyond its ability to be fair to all candidates." (*Id.*)

The polls were then closed for several hours while plaintiffs appealed the SERC's decision to CSI President Marlene Springer. Later that same afternoon, President Springer reopened the polls and allowed the voting to resume, but she reserved final decision on the validity of the election until after the voting was completed. (Am. Compl. ¶ 48).

Thereafter, on May 6, 1997, President Springer affirmed the SERC's decision nullifying the election due to the endorsement by the *College Voice* of the Student Union candidates, and scheduled a new election. In her findings, she stated:

The *College Voice* inappropriately used student

activity fee funds to publish and distribute approximately five thousand copies of a twenty-eight page issue of the *College Voice* with a cover boldly encouraging a vote for a particular slate of candidates, some of whom are also staff members of the *College Voice*. Moreover, much of the issue was substantially devoted to supporting the endorsed slate of candidates. I find that this issue amounted to a thinly veiled student activity fee funded piece of campaign literature for the Student Union slate. As a result, the electoral process was compromised beyond its ability to be fair to all candidates, as argued by other candidates who requested nullification of the election.

The April 30th to May 3rd election is therefore declared null and void, and a new election shall be scheduled for the period Thursday May 8th, 1997 through Friday, May 16, 1997.[7]

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[7] CSI administrators take the position that it was unfair for candidates running on the Student Union slate to use their connection with the *College Voice* to obtain access to a publication that was not equally available to other candidates and to prevail upon their "friends" to publish the endorsement of the Student Union slate, thereby providing the Student Union candidates with "free" publicity supported by student activity fees. Despite the statements of Mr. Wharton regarding the decision by the Student Union candidates not to participate in the editorial board's decisions on what to publish in the issue and whether to endorse certain candidates (Hrg. Tr. at 60-62, 75-76), it is clear that the CSI administration did not credit these representations in reaching their determination that the publication of the election issue was unfair. It should be noted, however, that there has been no authority or CSI guidelines cited to this Court prohibiting candidates for student government from also participating on a student publication.

(Jan. 28, 2000 Hearing, Pls.' Ex. 7).

President Springer then ordered a tally of the election results, which showed that the Student Union candidates had succeeded in winning all of the 37 races in which they competed. In the second election ordered by President Springer, the Student Union candidates again won the election.

Plaintiffs allege that several months after the spring election, a special three-day election was held to fill certain vacancies on the student government. On the second day of this fall 1997 election, defendant Marla Brinson, Director of Student Life at CSI, directed Student Union candidates to "cease and desist from using the name" Student Union during the election campaign and prohibited them from distributing campaign literature bearing the Student Union name. (Third Am. Compl., Ex. 2). Plaintiffs allege that this decision seriously hindered their ability to campaign effectively because all of their campaign literature included references to the Student Union slate. The ban on the use of this literature was ultimately reversed by the SERC and a one-day extension in the time for voting was granted.[8] However, plaintiffs contend that because of the two-day prohibition on distributing campaign literature, two of the three Student Union candidates were defeated. (Third Am.

[8] The SERC had originally ordered a two-day extension of the voting period, which was subsequently reduced to a one-day extension by President Springer.

Compl. ¶¶ 63-67).[9]

Plaintiffs assert that the CUNY defendants' actions here constitute an unprecedented restriction on the ability of college newspapers to cover student government elections and to endorse candidates for those student elections, and an impermissible retaliation for the view points expressed by the plaintiffs. Specifically, plaintiffs claim that prior to the Spring 1997 election, student journalists at CSI or at any of the other CUNY colleges were permitted to endorse candidates for student government elections without restriction and, indeed, since that election, some

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[9] Although plaintiffs discuss this incident in their motion papers and seek an order enjoining defendants from "Prohibiting candidates in student government elections from distributing publicity identifying themselves as a slate" (Pls.' Mem. of Law in Supp. of Mot. for Preliminary Injunction ("Pls.' Mem.") at 92), they did not address this issue during the preliminary injunction hearing nor have they demonstrated a need for such injunctive relief. Indeed, it appears clear from Ms. Brinson's memorandum that the attempted restriction was based on a question of the chartering of the Student Union (Oct. 29, 1997 Mem., Ex. 2 to Third Am. Compl.), which began as a College club (Hrg. Tr. at 78-80), and not because the candidates were running as a slate. Moreover, according to Mr. Wharton's testimony at the hearing, the Student Union slate ceased to exist as of the Spring 1998 election, when a new group called the "Progressive Student Alliance" ran a slate of candidates for the student government election. (*Id.* at 67-68). Since then, other slates have been formed. (*Id.* at 69-70). Thus, in the absence of any evidence to suggest that this incident was part of a policy of the CSI administration or that there is any likelihood of a recurrence in the future, this Court finds that plaintiffs have failed to sustain their burden and respectfully recommends that their request for a preliminary injunction be denied to the extent that they seek an order in this regard.

student newspapers at CUNY colleges have continued to endorse candidates without restriction.[10] According to the affidavit of William Wharton, in May 1998 and April 1999, the *College Voice* was permitted to endorse candidates, but the editors decided to reduce their election coverage to avoid reprisals from the CUNY defendants. (Wharton Aff. ¶ 13; Hrg. Tr. at 64).

Plaintiffs allege that defendants' actions stem from a longstanding dispute between the CUNY defendants and the editors of the *College Voice*, which has historically been critical of the CSI and CUNY administrations. Specifically, plaintiffs claim that prior to the 1997 election, staff members and editors of the *College Voice* participated in the "CUNY Coalition," which is a group of students from CSI and other CUNY colleges that expressed their opposition to tuition increases and budget cuts and organized various activities and demonstrations in support of their position. According to plaintiffs, in 1995, CUNY created a "Black List" containing the names of 90 activists, including plaintiff Husain and another *College Voice* editor, who had been arrested at various CUNY Coalition demonstrations. (McGuire Decl. ¶¶ 15-16, Ex. 8). Plaintiffs also allege that CUNY security officers at another CUNY College, the City College of New York, conduct-

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[10] However, plaintiffs allege that another CUNY college, City College of New York ("CCNY"), took similar action in April 1998 when it nullified the election results in CCNY's graduate student government election based on endorsements published in the *CCNY Messenger*, a graduate student newspaper printed at CCNY. (Pls.' Mem. at 16-17, 80 (citing *Sigal v. Moses*, No. 98 CV 3940 (TG) (S.D.N.Y.)). Following the nullification of that election, the entire CCNY graduate student government was suspended for several months.

ed covert surveillance of a campus office used for meetings of student political groups that were associated with students on the *College Voice*.[11] Indeed, it was discovered that campus security had installed a surveillance camera hidden in a smoke detector at the entrance of a student meeting room. (*See* First Am. Compl. for *Sigal v. Moses*, 98 CV 3940 (TG) (S.D.N.Y); McGuire Decl. ¶¶ 8-9; Exs. 3, 4).[12]

Plaintiffs assert that by cancelling the 1997 CSI spring election and the 1998 CCNY graduate student government election, the CUNY defendants have demonstrated a policy of engaging in impermissible viewpoint discrimination in violation of the First and Fourteenth Amendments. By selectively proscribing certain publications and nullifying the elections of candidates who are antagonistic to the CUNY defendants' interests, plaintiffs allege that the CUNY defendants have effectively "chilled" plaintiffs' exercise of their First Amendment rights. Plaintiffs argue that since the CUNY defendants continue to assert the ability and authority to exercise control over the viewpoints expressed in the student newspapers and in the campaign literature of the candidates, there is a likelihood that plaintiffs' rights will be abridged in the near future when the *College Voice* editors determine the extent of their coverage of the Spring 2000

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[11] According to plaintiffs, two of the three *Sigal* plaintiffs were also on the "Black List."

[12] According to the affidavit of Timothy L. Hubbard, Director of Security for CCNY, the camera was installed in the public hallway due to concerns about recent thefts from the college. (McGuire Decl., Ex. 4).

student government election and whether or not to endorse a slate of candidates. Thus, plaintiffs urge this Court, to enter a preliminary injunction to prevent the CUNY defendants from interfering with plaintiffs' rights.

STANDARD FOR ISSUING A PRELIMINARY INJUNCTION

In the Second Circuit, it is well-settled that in order to obtain a preliminary injunction, "a party must demonstrate (1) that it will suffer irreparable harm if the preliminary injunction is not issued; and. (2) that it is likely to succeed on the merits of its claims or, in the alternative, has demonstrated sufficiently serious questions regarding the merits of the claims and the balance of hardships tips decidedly in its favor." *L. & J.G. Stickley, Inc. v. Canal Dover Furniture Co., Inc.*, 79 F.3d 258, 261-62 (2d Cir. 1996); *accord Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam). It is equally well-established that a preliminary injunction is "an extraordinary remedy" that "should issue not upon a plaintiffs imaginative, worse case scenario of the consequences flowing from the defendant's alleged wrong but upon a concrete showing of imminent irreparable injury." *U.S.A. Network v. Jones Intercable, Inc.*, 704 F. Supp. 488, 491 (S.D.N.Y. 1989). The mere possibility of irreparable harm is insufficient. *See Borey v. National Union Fire Ins. Co.*, 934 F.2d at 34 (2d Cir. 1991). The claimant must show that the alleged injury is likely and imminent, not remote or speculative, and must also show that the injury cannot be fully remedied by monetary damages. *See*

Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir. 1990); *see also Borey v. National Union Fire Ins. Co.*, 934 F.2d at 34 (holding that "when a party can be fully compensated for financial loss by a money judgment, there is simply no compelling reason why the extraordinary equitable remedy of a preliminary injunction should be granted").

DISCUSSION

A. IRREPARABLE HARM

Plaintiffs in this case seek a preliminary injunction, contending that in the absence of such an injunction, plaintiffs will suffer irreparable injury because of the "chilling" of their First Amendment rights to publish articles regarding the upcoming Spring 2000 student government election and to endorse candidates for that election.

In response to plaintiffs' motion for injunctive relief, defendants argue that the plaintiffs have failed to establish that they will suffer irreparable injury because they cannot show that their interests will be affected since they "have not decided whether they wish to participate in future elections either as candidates or endorsers." (CUNY Defs.' Mem. of Law in Opp'n to Pls.' Mot. for a Preliminary Injunction ("Defs.' Mem.") at 11). Defendants also argue that since the *College Voice* was permitted to endorse slates of candidates in the 1998 and 1999 student government elections, there is no basis for believing that plaintiffs' rights will be interfered with in such a way as to justify a finding of irreparable injury that

would warrant issuance of an injunction. Moreover, defendants contend that the fact that there was no interference by the CUNY defendants in the 1998 and 1999 CSI student government elections commands the conclusion that the plaintiffs' fears of future retaliation are remote and speculative. (Defs.' Mem. at 12).[13]

The Supreme Court has held that [t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *accord Bery v. City of New York*, 97 F.3d 689, 693 (2d. Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997); *The Brooklyn Institute of Arts & Sciences v. City of New York*, 64 F. Supp.2d 184, 197 (E.D.N.Y. 1999). Thus, when a party has alleged a deprivation of a First Amendment right, courts do not require any further showing concerning irreparable harm, *see Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984); *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991), and, indeed, some courts have noted that in these cases, "'likelihood of success on the merits and irreparable harm merge into a single threshold requirement.'" *The Brooklyn Institute of Arts & Sciences v. City of New York*, 64 F. Supp.2d at 197

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[13] With respect to the portion of plaintiffs' motion seeking injunctive relief preventing the CUNY defendants from impounding the *College Voice* or otherwise interfering with its distribution, plaintiffs note in their Reply Memorandum that they have modified their request for injunctive relief to delete that portion of the request pending further discovery. (Pls.' Reply Mem. of Law in Supp. of Injunctive Relief and Summary J. ("Pls.' Reply Mem.") at 12 n.6).

(quoting *801 Conklin St. Ltd. v. Town of Babylon*, 38 F. Supp.2d 228, 235 (E.D.N.Y. 1999) (citations omitted)).

Assuming that plaintiffs have adequately alleged a deprivation of their First Amendment rights,[14] that allegation, without more, is sufficient to sustain a finding of irreparable injury. *See Mitchell v. Cuomo*, 748 F,2d at 806; *Paulsen v. County of Nassau*, 925 F.2d at 68. Here, however, there is additional overwhelming evidence that irreparable injury is likely to occur in the absence of the requested relief. First, based on the testimony of Mr. Wharton, the cancellation of the 1997 student election in response to the viewpoints published in the *College Voice* caused the editors of the paper to significantly reduce their coverage of the 1998 and 1999 elections in order to avoid the cancellation of these subsequent elections. (Wharton Aff. ¶ 13; Wharton Reply Decl. ¶ 6-7; Hrg. Tr. at 64). Moreover, the CUNY defendants' continued professed right to impose restrictions on the conduct of student government elections, "including stopping student candidates from using their influence to transform a student newspaper into campaign literature" (Defs.' Mem. at 14), coupled with their actions in connection with the 1998 CCNY graduate student elections, indicates that a reasonable basis exists for plaintiffs to be concerned about the ramifications of publishing an election issue that does not comport with the CUNY defendants' view of the appropriate scope of election coverage. Indeed, during the prelimi-

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[14] Defendants' argument that plaintiffs have failed to allege a *prima facie* First Amendment violation is addressed *infra* at pp. 15-23. [139a-149a]

nary injunction hearing, CUNY's Associate General. Counsel, Michael Solomon, confirmed the likelihood that CSI would once again cancel the student government elections if the *College Voice* published an edition like the one printed in 1997. Specifically, Mr. Solomon told this Court:

> I think if this happened again in spring 2000, the April 2000 elections and this identical issue came out [referring to the 1997 *College Voice* election issue], something [looking] like this and a student appealed, I think the Court should have a reasonable expectation the same thing would happen. The election results would be voided,

(Hrg. Tr. at 35-36).

Accordingly, this Court finds that plaintiffs have satisfied the irreparable harm requirement for the granting of a preliminary injunction.

B. LIKELIHOOD OF SUCCESS ON THE MERITS

Defendants also contend that even if plaintiffs could demonstrate irreparable injury, they cannot show a likelihood of success on the merits. In essence, defendants argue that plaintiffs have failed to allege a *prima facie* First Amendment violation since the *College Voice* was ultimately distributed and did not experience any reduction in funding. Moreover, defendants argue that since the college officials have a legitimate interest in regulating student government elections and ensuring a fair electoral process, they

have the responsibility to stop the "student candidates from using their influence to transform a student newspaper into campaign literature." (Def's' Mem., at 14). Defendants' arguments suggest that impoundment of the paper or revocation of funding are the only bases on which plaintiffs can claim a violation of their First Amendment rights. This Court does not agree.

In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Supreme Court held that the University of Virginia, a state instrumentality, could not withhold funding derived from mandatory student fees from a student newspaper because the newspaper promoted a particular religious philosophy or belief. The Court noted that "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys," *id.* at 828 (citations omitted), and that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829 (citations omitted). "Viewpoint discrimination is thus an egregious form of content discrimination." Id.

The Court in *Rosenberger* held that where a public college collects mandatory non-refundable student activities fees that are dedicated to funding various student activities, the State creates a limited public forum and that having done so, the State is forbidden from exercising "viewpoint discrimination, even when the limited public forum is one of its own creation." *Id.* at 829-30. The Court explained that these principles are particularly vital in the context of viewpoint

discrimination in the setting of a university.

> The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition . . . . The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

Id. at 835-36 (citations omitted).

In this case, the student activity fees collected by CUNY resemble the fees collected in *Rosenberger* and are used essentially for the same purpose, supporting student publications and other activities. *See Smith v. City University of New York*, 92 N.Y.2d 707, 715-16, 708 N.E.2d 983, 987, 685 N.Y.S. 2d 910, 914 (1999). Thus, there appears to be no dispute that the CUNY defendants have no authority to exercise control over or review of the editorial decisions of its student newspapers. *See Leeds v. Meltz*, 85 F.3d 51, 54-55 (2d. Cir. 1996) (noting that "CUNY did not, and recognized

that it could not, control the editorial decisions of student editors" and citing a legal memorandum to the CUNY Council of Presidents, dated January 11, 1995, which "expressly disclaim[ed] any right of the institution to control student publications, such as those financed through student activity fees").

Defendants argue that plaintiffs are not likely to succeed on the merits of their claim because they have not alleged that the CUNY defendants interfered either with the distribution or funding of the *College Voice*. While it is true that the Court in *Rosenberger* focused on a refusal of the University to provide funding as the basis for a claimed First Amendment violation, nothing in that case suggests that other means of discriminating or retaliating against a student newspaper based on the viewpoint expressed therein are not equally actionable. *See, e.g., The Brooklyn Institute of Arts & Sciences v. City of New York*, 64 F. Supp.2d at 197-98 (finding that the Brooklyn Museum had been penalized not only by the City's funding decision, but also by the threat of ejectment from City premises); *see also Romano v. Harrington*, 725 F. Supp. 687 (E.D.N.Y. 1989) (denying defendants' motion for summary judgment because there existed material issues of fact relating to the plaintiff's claim that his termination as faculty advisor to a high school newspaper based on a student's article published in the paper constituted a violation of his First and Fourteenth Amendment rights).

Here, the CUNY defendants' decision to cancel the 1997 election results based upon the content of the *College Voice* election edition can be seen as an act of

retaliation by the CUNY defendants against the Student Union candidates and the editors of the *College Voice* who supported those candidates. While not preventing the dissemination of these views, the CUNY defendants' actions in calling for a new election and new voting, placed the election of the Student Union candidates in jeopardy because of the viewpoints published in the *College Voice* election issue. Such actions can be viewed as having a serious chilling effect on future publications of the *College Voice*. It is clear that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972); *accord Hankard v. Town of Avon*, 126 F.3d 418, 423 (2d Cir. 1997).

Defendants contend, however, that plaintiffs cannot establish that: "(1) they engaged in speech directed at a matter of public concern and, hence, protected; and (2) the protected speech was a substantial or motivating factor in the adverse decision made by the defendants." (CUNY Defs. Mem. of Law in Supp. of Mot. to Dismiss at 12-13 (citing *Connick v. Meyers*, 461 U.S. 138, 143-49 (1983); *Mount Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 285-87 (1977)). Defendants also contend that even if plaintiffs engaged in protected speech, President Springer's decision was not based on the viewpoints expressed in the *College Voice* election issue, but rather on the unfairness presented by the Student Union candidates' use of a student funded newspaper to promote their candidacy.

First, based on the record before this Court, it appears likely that plaintiffs will be able to establish that the articles and editorials published in the *College Voice* dealing with the governance and policies of the College and the qualifications of the candidates for student government are the quintessential type of expression that the First Amendment was intended to protect.

With respect to the rationale behind President Springer's decision to cancel the election, the basis for that decision is clearly set forth in her memorandum announcing the nullification of the spring 1997 election. In essence, she concluded that the election issue of the *College Voice* was "a thinly veiled student activity fee funded piece of campaign literature for the Student Union Slate" that unfairly influenced the student elections. (Jan. 28, 2000 Hearing, Pls.' Ex. 7). In order for her to reach that conclusion, President Springer had to review the content of the paper and engage in "precisely the kind of classification of viewpoints by a state actor that the Supreme Court identified as '[t]he first danger to liberty.'" (Pls.' Mem. at 20-21 (citing *Rosenberger*)).

Moreover, a close review of the issue itself raises serious questions as to the analysis conducted by President Springer. The issue, which consists of 28 pages in total, contained not only an editorial endorsing the Student Union candidates, written by Manjula Wijerama who was not a candidate on the Student Union slate, and platform statements submitted by certain Student Union candidates, but it also included articles written by student journalists who were not student government candidates, some critical of the

incumbent student government and others that had nothing to do with the election.[15] (Wharton Aff. ¶ 7; Jan. 28, 2000 Hearing, Pls.' Ex. 2 at 2, 3-4, 6-7, 8-9). In determining that the edition was "a thinly veiled . . . piece of campaign literature," President Springer

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[15] Indeed, a review of the *College Voice* edition at issue here reveals that out of 28 pages, only five pages were directly related to the campaign. In addition to the front and back pages, and the editorial page (p. 2), two pages were devoted to the platform statements of twenty-four Student Union candidates (pp. 6-7), with each statement averaging 100-150 words apiece. There were also four articles relating to various actions taken by the incumbent student government, which appear on pages 3, 8, and 9. The remainder of the issue consists of articles written by various student journalists, covering such issues as the demonstration protesting tuition hikes (p. 4); an article on student activity fees (p. 5); an article about a proposal to allocate space at CSI to New York University (p. 5); an article about workfare (p. 10); an article about the CSI shuttle bus (p. 10); an article about a forum for New York City Mayoral candidates (p. 11); two articles about Chancellor Reynolds' visit to campus (pp. 12, 13); two articles relating to campus security (pp. 14, 15); an editorial on the Peruvian military (p. 16); an article on the New Caucus (p. 18); an article on the History of CUNY (p. 19); an article on the Pan-African celebration (p. 24); an article on rent issues in the City of New York (p. 26); and five pages devoted to poetry, letters to the editor, the campus radio station, music, and the arts (pp. 17, 20, 21, 22-23). While the two cover pages and the page devoted to the editorial endorsing the Student Union slate might be considered "campaign literature," the remainder of the paper appears to be a typical issue of a student newspaper that is dedicated in part to covering not only a hotly-contested student government election, but other issues of local, national, and international interest as well. Moreover, to the extent that the paper devoted two pages to publish the platform statements of certain Student Union candidates, each statement was relatively short and approximated the description of the space devoted in the *Banner* to student platform statements. (Hrg. Tr. at 104-05).

would have had to have analyzed the content of each of the articles to determine if they were political endorsements or some other kind of article.[16]

In further support of their claim that President Springer's decision was based on the views expressed in the *College Voice*, plaintiffs point to the undisputed fact that the CUNY defendants have not banned all endorsements of candidates for student government offices, but have allowed endorsements to be made by other CSI publications, including the *College Voice* in the 1998 and 1999 elections. Thus, plaintiffs contend that it is unclear on what basis the CUNY defendants might determine that an issue of the *College Voice* impermissibly constitutes "campaign literature," warranting invalidation of an election.[17] As Mr.

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[16] Defendants appear to argue that their actions in nullifying the election are somehow justified because they were prompted by the complaint of another student. Regardless of what prompted the decision to nullify the election, it is clear that the state's decision in this instance was based on the views expressed in the *College Voice*.

[17] It should be noted that while defendants point, to the absence of any platform statements from non-Student Union. candidates, there is no evidence before this Court to suggest that any non-Student Union candidate sought to publish a platform statement in the 1997 election issue and was refused. Joseph Canale did testify that in an earlier election in which he ran unopposed, he approached the editor of the *College Voice*, who is not one of the editors involved in this litigation, and asked if the paper would print his platform statement. At that time, no platform statements were printed in the *College Voice*. The editor told Canale he would think about it but Canale's statement was not published, nor was anyone else's statement published at that

(continued...)

Wharton noted in his affidavit, " [w]e have no way of knowing in advance whether articles or endorsements will be permitted or [will] trigger reprisals by the CSI administration." (Wharton Aff. ¶ 13). Although Associate General Counsel Solomon indicated during the hearing that the front and back covers of the 1997 election issue were the main concerns of the CSI administration at the time (Hrg. Tr. at 35-36), there have been no regulations promulgated since then that define what will and will not be permitted. Mr. Solomon suggested that the student editors of the *College Voice* could submit a proposed issue in advance of publication for review by the SERC to determine if the issue is appropriate or not. (Hrg. Tr. at 43-44). Such prior review by the administration or one or its regulatory committees is the epitome of what the First Amendment is designed to protect against. *See ACLU of Virginia v. Radford College*, 315 F. Supp. 893, 896-97 (W.D. Va. 1970) (noting that a state university cannot "support a campus newspaper and then try to restrict arbitrarily what it may publish, even if only to require that material be submitted to a faculty board to determine whether it complies with 'responsible freedom of the press'") (citations omitted).

Although plaintiffs concede that the College has a

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[17](...continued)
time. (Hrg. Tr. at 83-86). Given the fact that the CUNY defendants concede that they have no authority to regulate the decisions of the editorial board in deciding what to publish, *see Leeds v. Meltz*, 85 F.3d at 55, and given the absence of any regulations on the publication of platform statements by the *College Voice*, the lack of non-Student Union platform statements is not determinative of the issues here.

legitimate interest in ensuring a fair student government election and that CSI may promulgate regulations to that end, plaintiffs contend that the right of the student journalists to publish without fear of viewpoint-based restrictions is a "vital" and fundamental First Amendment right, *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. at 835-36, and can only. be regulated by the state when necessary to achieve a compelling state interest. *See Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). By contrast, the rights of the candidates in a student government election have been held not to be "of the same character or caliber as those that have already been deemed 'fundamental' for constitutional purposes." *Sellman v. Baruch College*, 482 F. Supp. 475, 479-80 (S.D.N.Y. 1979); *see also Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that the public's interest in regulating campaign spending must yield to the First Amendment rights of individuals and groups to spend their resources on political communication).

Even if the court were ultimately to hold that the College's interest in regulating the conduct of the student government elections was a compelling state interest, it is clear that the state is required to employ the least restrictive means of achieving its objective. *See Sable Communications v. FCC*, 492 U.S. at 126. Here, there are other less restrictive options available to the CUNY defendants to ensure a fair student election campaign that do not produce the same chilling effects on the First Amendment rights of its student journalists. *See id.; Dial Information Serv's Corp. v. Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991). These include organized candidate debates, funding for platform publications by all student

candidates, or guidelines concerning the publication of candidate platforms for *all* CSI publications. Given the proliferation of student publications, including a college radio station at CSI, there is a serious question as to whether the CUNY defendants chose the least restrictive means available to remedy a perceived inequity in the election process. In summary, based on the record before this Court, it appears that plaintiffs have stated a valid claim that defendants' actions in cancelling the results of the 1997 student election operated as a species of post-publication restraint that has had a "chilling effect" on plaintiffs' exercise of their First Amendment rights.[18]

C. CONCLUSION

Accordingly, because this Court finds that plaintiffs have alleged a *prima facie* violation of their First Amendment rights and have demonstrated a likelihood of success on the merits, and have demonstrated that they will suffer irreparable harm if the motion is not granted, this Court respectfully recommends that a preliminary injunction issue prohibiting the CUNY defendants from:

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[18] In making this finding, this Court focuses solely on the student journalists' rights. There is a subsidiary question raised by plaintiffs' motion as to whether the student candidates and student voters have standing to assert violations of the First and Fourteenth Amendments. At this time, this Court recommends the issuance of a preliminary injunction based solely on the potential chilling effect of defendants' actions on the student journalists' First Amendment rights; this Court does not address the standing issue in this Report and Recommendation, but will address it in the context of defendants' motion to dismiss.

(a) Taking any actions to prohibit, discourage, or penalize the editors and staff of the *College Voice* or other student newspapers from publishing articles or editorials expressing viewpoints, such as candidate endorsements, concerning student government elections;

(b) Declaring the results of any student government election invalid, or cancelling a student government election, because of an article or editorial in the *College Voice* or other student newspaper endorsing or opposing any candidate in such an election; and

(c) Taking any action to penalize or disqualify any candidate or slate of candidates in a student government election because the candidate or slate was endorsed by a student publication.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within ten (10) days of receipt of this Report. Failure to file objections within the specified time waives the right to appeal the District Court's order. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72; *Small v. Secretary of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989).

The Clerk is directed to mail copies of this Report and Recommendation to the parties.

SO ORDERED.

/s/ CHERYL L. POLLAK
United States Magistrate Judge

Dated: Brooklyn, New York
February 8, 2000

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 97 CV 2982 (NG)(CLP)

Decided: February 10, 2000
Filed: February 16, 2000

SARAH HUSAIN, *et al.*,
Plaintiffs,
-v.-

MARLENE SPRINGER, *et al.*,
Defendants.

ORDER

CHERYL L. POLLAK, U.S.M.J.:

On February 8, 2000, this Court issued a Report and Recommendation in this case that recommended that plaintiffs' motion for a preliminary injunction be granted in part. In light of certain comments made during the February 10, 2000 conference before the

Honorable Nina Gershon, it became apparent that a clarification of the scope of this recommendation was required. This Order clarifies that Report and Recommendation. Specifically, the preliminary injunction recommended by this Court, contained on pages [149a-150a] of the February 8 Report and Recommendation, applies only to the College Voice and other student publications at the College of Staten Island ("CSI") and only to student government elections at CSI. The preliminary injunction recommended by this Court does not apply to student publications or student government elections at any other CUNY colleges or universities. Thus, the preliminary injunction recommended by this Court should read as follows:

the CUNY defendants are prohibited from:

(a) Taking any actions to prohibit, discourage, or penalize the editors and staff of the *College Voice* or other student newspapers at CSI from publishing articles or editorials expressing viewpoints, such as candidate endorsements, concerning student government elections at CSI;

(b) Declaring the results of any CSI student government election invalid, or cancelling a CSI student government election, because of an article or editorial in the *College Voice* or other student newspaper at CSI endorsing or opposing any candidate in such an election; and

(c) Taking any action to penalize or disqualify any candidate or slate of candidates in a CSI student government election because the candidate or slate was endorsed by a student publication at CSI.

SO ORDERED.

/s/ CHERYL L. POLLAK
United States Magistrate Judge

Dated: Brooklyn, New York
February 10, 2000

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 97 CV 2982 (NG)(CLP)

Decided: March 23, 2000
Filed: March 27, 2000

SARAH HUSAIN, *et al.*,
Plaintiffs,

-v.-

MARLENE SPRINGER, *et al.*,
Defendants.

ORDER

NINA GERSHON, U.S.D.J.:

Plaintiff's [sic] motion for a preliminary injunction relating to an anticipated Spring 2000 student election, filed on November 1, 1999, was referred to Magistrate Judge Cheryl L. Pollak for a Report and Recommendation. Judge Pollak issued her report on February 8, 2000 recommending that a preliminary injunction be issued and clarified her report in an order dated February 10, 2000. Defendants filed an objection on February 25, 2000 and plaintiff [sic]

responded on March 10, 2000. A hearing was held before this court on the motion on March 21, 2000.

In light of defendants' recent submissions to the court, a letter from Assistant Attorney General Steven Banks dated March 17, 2000, and a letter dated March 22, 2000 from Jane Sovern, Deputy General Counsel of the City University of New York, and the representations made on the record by defendants' counsel at the hearing held March 21, 2000, it is the court's understanding that the rule applicable in the 1997 election that stated that "Publications funded by Student Activity Fee (sic) cannot be used as campaign flyers or posters during the student elections and cannot be used as a means to distribute campaign flyers or posters" has been repealed, and further it is agreed that defendants will not change the Rules Governing the Spring 2000 Student Elections at the College of Staten Island prior to the resolution of litigation is this case or, in fact, during the duration of President Marlene Springer's administration, nor will defendants cancel any election in response to endorsements or opinions on elections published in student newspapers. In sum, defendants have agreed that they will not prohibit any College of Staten Island student activity fee-funded publications from being used as campaign flyers and posters. Therefore, a determination on plaintiff's [sic] motion for preliminary injunctive relief has been rendered unnecessary.

In any event, plaintiffs having not conceded that preliminary injunctive relief is no longer necessary, I have reviewed the merits of the pending motion for a preliminary injunction. As stated on the record of the hearing held March 21, 2000, plaintiff [sic] has failed

to demonstrate a threat of irreparable harm and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the claim to make it a fair ground of litigation and a balance of hardships tipping decidedly in favor of the moving party. *See Time Warner Cable of New York City v. Bloomberg L.P.*, 118 F.3d 917, 923 (2d Cir. 1997).

SO ORDERED.

/s/ NINA GERSHON
United States District Judge

Dated: Brooklyn, New York
March 23, 2002

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 97 CV 2982 (NG)(CLP)

Decided: May 1, 2001
Filed: May 1, 2001

SARAH HUSAIN, *et al.*,
Plaintiffs,
-v.-

MARLENE SPRINGER, *et al.*,
Defendants.

REPORT AND RECOMMENDATION

CHERYL L. POLLAK, U.S.M.J.:

By Notice of Motion dated December 24, 1999, defendants City University of New York ("CUNY"), the College of Staten Island ("CSI"), the Board of Trustees of CUNY, and certain of the individually named

members of the CSI and CUNY administrations[1] (collectively, the "CUNY defendants") move for an order pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, dismissing plaintiffs' claims. Plaintiffs, in turn, move for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment as to CSI President Marlene Springer. By Order dated March 15, 1999, these motions were referred to the undersigned to prepare a Report and Recommendation.

FACTUAL BACKGROUND

A. The Underlying Dispute

A detailed description of the circumstances leading to this controversy is set forth in this Court's Report and Recommendation dated February 8, 2000, recommending the issuance of a preliminary injunction.[2]

In essence, plaintiffs commenced this action pursuant to 42 U.S.C. § 1983, alleging that defendants had engaged in viewpoint discrimination in violation of plaintiffs' First Amendment rights when President Springer made the decision on May 6, 1997 to nullify the results of the Spring 1997 CSI student govern-

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[1] These include defendant officers of CSI, Marlene Springer, Carol Jackson, Kathleen Galvez, Michael Silva, and Marla Brinson, and officers of CUNY, W. Ann Reynolds, Robert E. Diaz, Roy Moskowitz, Michael Solomon and Matthew Goldstein.

[2] Familiarity with this Court's February 8, 2000 Report is presumed.

ment election because a student newspaper, the *College Voice*, issued an endorsement for one slate of candidates running in the student government election. For purposes of considering plaintiffs' motion for summary judgment, the parties stipulate that the following facts are not in dispute.

In the Spring of 1997, the *College Voice* was a CSI student newspaper funded in part by student activities fees collected from each CSI student. (Pls.' Rule 56.1 Stmnt. ¶¶ 2, 8). The May 1997 issue of the *College Voice*, which was scheduled for distribution prior to the commencement of voting for candidates in the CSI Spring 1997 student government election, contained an editorial endorsing candidates running for 37 positions on the "Student Union" slate. (*Id.* ¶ 9; *see also* Ex. 2 to the Affidavit of William Wharton, dated Jan. 20, 2000 ("Wharton Aff."). On the front page of the newspaper was an endorsement encouraging the reader to "Vote Student Union!" and on the back cover was printed the "12-Pt. Program for Change" advocated by the Student Union slate. (Wharton Aft., Ex. 2). The issue also devoted two pages to the platform statements of 24 Student Union candidates, including plaintiffs Devon Blinth, Colleen McGraham, Kathleen McHugh, Neil Schuldiner, and William Wharton, all of whom were contributors to or editors of the *College Voice*. (Pls.' 56.1 Stmnt ¶ 9; Wharton Aff. Ex. 2). Of the remaining 23 out of 28 pages of the issue, there were four articles relating to actions taken by the incumbent student government and the remainder of the issue was dedicated to articles on issues of local, national and international interest. (Wharton Aff., Ex. 2).

It is undisputed that candidates running on the slate opposed to the Student Union platform did not submit their platform statements to the *College Voice*. (Wharton Aff. ¶ 8; Def's.' 56.1 Stmnt at n.2). Instead, their platform statements were published in another CSI student funded newspaper, the *Banner*. (*Id.*)

On April 30, 1997, Andre Woods, a CSI student and an incumbent member of the 1996-97 CSI student government, who was running in the election against the Student Union slate, sent a letter to the Student Election Review Committee (the "SERC"), complaining about the *College Voice*'s endorsement of certain candidates which he claimed violated the Electoral Rules Governing Candidates and prejudiced the non-Student Union candidates. (Pls.' 56.1 Stmnt ¶ 10; Ex. A to Decl. of Steven L. Banks, dated December 24, 1999 ("Banks Aff.")).

On the following day, May 1, 1997, at the conclusion of an executive session, the SERC voted to postpone the student government election until a later date, concluding that "the electoral process had been compromised beyond its ability to be fair to all candidates." (Pls.' 56.1 Stmnt ¶ 11). As a result of the SERC's decision, the polls were then closed while plaintiffs and other Student Union candidates appealed to CSI President Marlene Springer. (*Id.* at ¶ 12). She reopened the polls later that afternoon of May 1, 1997 but reserved her final decision on the validity of the election until after the voting was completed. (*Id.*)

Thereafter, on May 6, 1997, President Springer affirmed the SERC's decision nullifying the election

and scheduled a new election. In her findings, she stated:

> The *College Voice* inappropriately used student activity fee funds to publish and distribute approximately five thousand copies of a twenty-eight page issue of the *College Voice* with a cover boldly encouraging a vote for a particular slate of candidates, some of whom are also staff members of the *College Voice*. Moreover, much of the issue was substantially devoted to supporting the endorsed slate of candidates. I find that this issue amounted to a thinly veiled student activity fee funded piece of campaign literature for the Student Union slate. As a result, the electoral process was compromised beyond its ability to be fair to all candidates, as argued by other candidates who requested nullification of the election.
>
> The April 30th to May 3rd election is therefore declared null and void, and a new election shall be scheduled for the period Thursday May 8th, 1997 through Friday, May 16, 1997.[3]

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[3] CSI administrators take the position that it was unfair for candidates running on the Student Union slate to use their connection with the *College Voice* to obtain access to a publication that was not equally available to other candidates and to prevail upon their "friends" to publish the endorsement of the Student Union slate, thereby providing the Student Union candidates with "free" publicity supported by student activity fees. Despite the statements of Mr. Wharton regarding the decision by the Student Union candidates not to participate in the editorial board's decisions on what to publish in the issue

(continued...)

(Decl. of Ronald B. McGuire, dated Oct. 26, 1999, Ex. 1).

President Springer nevertheless ordered that the votes cast during the election be tallied and the results showed that the Student Union candidates succeeded in winning all 37 races in which they had competed. (Pls.' 56.1 Stmnt ¶ 14). Several days later, a second election was held between May 8, 1997 and May 16, 1997, at which time the Student Union candidates again won the election. (*Id.*)

B. Procedural History

Thereafter, on May 27, 1997, plaintiffs filed this action, seeking a declaratory judgment, injunctive relief, and damages from the CUNY defendants under Section 1983 and the New York State Open Meetings Law. N.Y. Pub. Off. Law § 100, *et seq.* (McKinney's 1988, 1988 Supp.). The Complaint also seeks declaratory relief and nominal damages from the student defendants who were members of the incumbent CSI student government in the spring of 1997.[4]

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[3](...continued)
and whether to endorse certain candidates (Hrg. Tr. at 60-62, 75-76), it is clear that the CSI administration did not credit these representations in reaching their determination that the publication of the election issue was unfair. It should be noted, however, that there has been no authority or CSI guidelines cited to this Court prohibiting candidates for student government from also participating on a student publication.

[4] The Honorable Nina Gershon, United States District Judge, *sua sponte* directed the parties to brief the issue of whether the
(continued...)

1. The Preliminary Injunction Motion

On November 1, 1999, plaintiffs filed a motion for preliminary injunction to prevent the CUNY defendants from prohibiting plaintiffs from publishing endorsements of candidates in future student government elections at CSI or any other CUNY college or for taking reprisals against plaintiffs for publishing such endorsements, including the cancellation of future election results. Following a referral of the motion to this Court, a hearing was held on January 28, 2000 and this Court, based on the evidence presented, recommended that a preliminary injunction enter. This recommendation was based largely on statements from CUNY and CSI officials that they would void future election results if a similar edition of the *College Voice* was published endorsing a slate of candidates, and the absence of any evidence indicating that there were regulations providing guidance as to when a student publication crossed the line between prohibited "campaign literature" and permissible journalistic coverage of student government elections at CSI. (Report dated Feb. 8, 2000 at 14, 21-23).

2. The March 21, 2000 Hearing Before the District Court

Objections to this Court's February 8, 2000 Report and Recommendation were filed by both parties and

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[4](...continued)
complaint should be dismissed as to the student defendants. That motion is currently *sub judice* before the district court and is not addressed in this Report and Recommendation.

on March 21, 2000, the Honorable Nina Gershon held a hearing on the parties' objections. Prior to the filing of their objections, neither party had referred to a specific rule or regulation in their papers or during their arguments before this Court that prohibited CSI student newspapers from publishing endorsements of candidates for student government elections, nor was there any indication from defendants during the preliminary injunction hearing that they relied on any specific rule or regulation in nullifying the election.[5] Thus, this Court had no knowledge of a specific rule until the defendants quoted a specific rule in a footnote in their objections to this Court's February 8, 2000 Report and Recommendation. (Defs.' Objections to the Report and Recommendation, dated February 25, 2000 ("Defs.' Objs."), at 11 n.2). The quoted rule was apparently the one in effect during the Spring 1997 election (the "1997 Rule"). It provides: "The campus newspapers may not be used as posters on

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[5] The only vague reference to the existence of rules and regulations governing student elections in any of the parties' papers submitted before this Court prior to the issuance of the February 8, 2000 Report and Recommendation appears in an exhibit to an affidavit submitted by defendants to this Court. (Aff. of Steven L. Banks, dated 12/24/99, Ex. A). Specifically, Andre L. Woods, a student at CSI, wrote an undated memorandum to Mike Silva, complaining about the May 1997 issue of the *College Voice*: "It states in the rules and regulations, that were distributed to all candidates, that they themselves signed, that it is illegal to utilize student newspapers to promote candidates. The exact rule is highlighted in the attachment with this letter." (*Id.*) However, no copy of the rules was attached to the submission received by the Court and no reference to this rule was made at any time by defendants either in their memoranda of law or during their arguments before this Court prior to the filing of objections.

walls, bulletin boards, etc. and may not be used as a means to distribute campaign flyers." (Defs.' Objs. at 11 n.2; Decl. of Timothy Jenkins, dated March 23, 2000, Ex. 1).

Prior to the March 21, 2000 hearing before the district court, Steven L. Banks, Esq., counsel for the CUNY defendants, also submitted a letter to the district judge dated March 17, 2000, which made reference to a different rule governing the Spring 2000 elections. That later rule, which was more specific in what it prohibited, provided that: "Publications funded by Student Activity Fee (sic) cannot be used as campaign flyers or posters during the student elections and cannot be used as a means to distribute campaign flyers or posters." (Attachment to Letter of Steven L. Banks, dated March 17, 2000 ("Defs.' 3/17/00 Letter"); Order of the Honorable Nina Gershon, dated March 23, 2000 ("3/23/00 Order"), at 1). In arguing against the need for a preliminary injunction, defendants informed the district court that this rule governing the Spring 2000 elections had been rescinded, and further represented that the rules governing the Spring 2000 CSI student elections would not change at all during President Springer's administration. (Defs.' 3/17/00 Letter; 3/23/00 Order at 1). Moreover, contrary to their earlier representations before this Court on January 28, 2000, defendants told the district court that the CSI administration would *not* cancel any future student government elections during President Springer's tenure based on endorsements or opinions published in the student newspapers. (3/23/00 Order at 1-2). According to the district court's March 23, 2000 Order, "defendants have agreed that they will not prohibit any College of Staten Island

student activity fee-funded publications from being used as campaign flyers and posters." (*Id.* at 2). Therefore, the court found that there was no need for a preliminary injunction and denied plaintiffs' motion for injunctive relief. (*Id.*)[6]

3. The Pending Motions

Defendants have moved to dismiss plaintiffs' claims against the CUNY defendants. In moving to dismiss, defendants raise several arguments. First, defendants contend that plaintiffs' complaint should be dismissed pursuant to Rule 12(b)(6) for failing to state a *prima facie* claim of a First Amendment violation. Defendants also assert that Eleventh Amendment immunity bars any claims asserted against CUNY, CSI, or its officers or trustees in their official capacity. Moreover, defendants contend that plaintiffs have failed to allege any personal involvement on the part of defendants Carol Jackson, W. Ann Reynolds, Robert E. Diaz, Roy Moskowitz, Michael Solomon, or Kathleen Galvez in any alleged constitutional violation. Finally, defendants contend that the plaintiffs' state law claims should be dismissed as well. In response, plaintiffs have moved for partial summary judgment against President Springer, claiming that there are no material issues of fact in dispute regarding whether her May 6, 1997 memorandum violated plaintiffs' First Amendment rights.

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[6] The district court also found that plaintiffs had failed to satisfy the requisite showing of likelihood of success on the merits needed to merit a grant of preliminary injunctive relief. (3/23/00 Order at 2).

In connection with these motions, this Court held a conference on February 9, 2001 to address the parties' respective positions on the plaintiffs' motion for summary judgment. Specifically, given defendants' representation before the district court on March 21, 2000 that in cancelling the Spring 1997 election, President Springer relied on the 1997 Rule prohibiting student newspapers from being "used as a means to distribute campaign flyers," and defendants' earlier failure to address this rule in its papers and arguments to this Court, this Court invited the parties to address their respective positions on the impact, if any, that reliance on the 1997 Rule would have on plaintiff's motion for summary judgment and on the motions to dismiss. (Jenkins Decl., Ex. 1).

At the February 9, 2001 conference, plaintiffs reiterated their position before the district court that "President Springer did not rely on the [1997 election] rule and did not cite the rule in her May 6th opinion and it was not relied upon in any of the arguments for what she had done." (2/9/01 Tr. at 9). Defendants, however, retreated from the position that they had previously taken before the district court in March 2000. The following colloquy before the district court in March 2000 reflects the defendants' position at the March 2000 conference in response to plaintiffs' position regarding the rule:

THE COURT: It seems to me President Springer is talking about the rule right in the face of the memorandum. I don't find that argument

persuasive.[7]

> I'm surprised to hear you say that CUNY is not relying on the regulations. I thought it was. Am I incorrect about that?

MR. BANKS: You are correct, Your Honor.

(3/21/2000 Tr. at 4).

However, before this Court, defendants' counsel, perhaps recognizing the more limited language of the 1997 Rule, indicated that CUNY was not relying exclusively on the rule, but rather that President Springer relied "in part" on the Rule; that it was the Rule "that got the whole ball rolling." (2/9/01 Tr. at 9). Counsel stated: "Now, you know, it is hard to say . . . that President Springer just only relied on the '97 rule. I mean, if she did, presumably her decision would have said, you violated this rule. It didn't, because the rule didn't specifically say the student newspaper cannot become a piece of campaign literature." (*Id.* at 13). Counsel further stated:

> [I]t is our position that she wasn't relying exclusively on that rule. She was relying on the fact that newspapers were being used as campaign literature. The rule doesn't seem to contemplate

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[7] In the arguments before the district court, plaintiffs' counsel had asserted: "CUNY has never rested their position on the defense of President Springer's cancellation of the election, never rested on the enforcement of the SERC rule." (3/21/00 Tr. at 3).

> that. It contemplates putting your endorsement inside the newspaper or tacking your newspaper up on the wall outside the polling booth.

(*Id.* at 10). Defendants argued that the rule was "not absolutely necessary" because "[o]nce the student newspaper became a thinly . . . veiled piece of campaign literature, it violated the spirit of that rule and the intent of that rule which was "not to use the newspapers for electioneering." (*Id.* at 10-11).

Despite the apparent dispute between the parties as to whether President Springer relied on the 1997 Rule and the extent to which she relied on the rule, plaintiffs contended that this dispute should not preclude a decision on the motion for summary judgment. Plaintiffs' position, as expressed to this Court on February 9, 2001, was that regardless of whether President Springer relied on the Rule or not, it was unconstitutional for her to scrutinize the newspaper "to determine whether or not [the newspaper's] endorsements have crossed some line and have become something which is impermissible." (*Id.* at 16). Further, in continuing to argue that President Springer engaged in impermissible viewpoint discrimination, plaintiffs' counsel stated that for purposes of the motion for partial summary judgment, plaintiffs were no longer arguing that President Springer was motivated by a particular animus towards the Student Union candidates or the newspaper because of their positions and rhetoric critical of the CUNY and CSI

administrations. (*Id.* at 23).[8]

THE FIRST AMENDMENT CLAIM

Turning first to defendants' motion to dismiss plaintiffs' First Amendment claims, defendants contend that plaintiffs' complaint should be dismissed in its entirety pursuant to Rule 12(b)(6) for failing to state a *prima facie* claim of a First Amendment violation. To the extent that the decision to cancel the election was made first by the CSI SERC and then by President Springer in her subsequent memorandum, defendants argue that these decisions were motivated not by any viewpoint discrimination, but rather were intended to "[p]revent[] gross unfairness in student elections [which] is a legitimate interest of the university." (Defs.' Mem. at 13).

In response, plaintiffs contend that the defendants' decision to cancel the 1997 student government election in reprisal for the endorsements in the *College Voice* clearly constitutes impermissible viewpoint discrimination in violation of their First Amend-

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[8] As noted in this Court's February 2000 Report and Recommendation, there were allegations in the Third Amended Complaint and evidence elicited during the course of the preliminary injunction hearing suggesting that prior to the Spring 1997 election, CSI student journalists had been permitted to endorse student government candidates without restriction, and that the cancellation of the 1997 election was in retaliation against the particular viewpoints expressed by the *College Voice* critical of the CUNY Administration. (See February 8, 2000 Report at 9-10 [132a-135a]; *see also* discussion *infra* at 23-25 [185a-188a]). Apparently, plaintiffs may no longer be pressing that argument. (2/9/01 Tr. at 23).

ment rights. Indeed, they argue that they are entitled to summary judgment as to their claims against President Springer based on her review of the content of the *College Voice* to determine that it constituted campaign literature which they contend is "precisely the kind of classification of viewpoints by a state actor that the Supreme Court identified as '[t]he first danger to liberty.'" (Pls.' Mem. at 20-21 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)).

A. Standard of Review

In reviewing a complaint for dismissal under Rule 12(b)(6), the court must accept the facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor. *See Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir.), *cert. denied*, 513 U.S. 836 (1994); *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). "In determining the adequacy of a claim under Rule 12(b)(6), consideration is limited to the facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). The complaint may be dismissed only where "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Under Rule 12(b), this Court may either exclude all materials and matters outside the pleadings and

decide the motion only on the allegations contained in the Complaint, or convert the motion to one for summary judgment under Rule 56, and afford all parties the opportunity to present additional supporting materials. *See Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24, 25 (2d Cir. 1988). In this case, plaintiffs have moved for partial summary judgment as to their First Amendment claims against President Springer, contending that there are no disputed issues of material fact with respect to their claim that President Springer engaged in prohibited viewpoint discrimination by cancelling the election. With respect to the First Amendment claim against President Springer, this Court has confined its analysis to the facts stipulated to by the parties in their respective Rule 56.1 Statements and to the documents appended to the motion papers. With respect to any remaining claims as to the other defendants, this Court has declined to convert the motion to dismiss into a motion for summary judgment and instead has accepted all of the allegations in the Complaint as true for the purposes of the remaining issues.

It is well-settled that a party moving for summary judgment has the burden of establishing that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir. 1990). Since summary judgment is an extreme remedy, cutting off the rights of the non-moving party to present a case to the jury, *see Egelston v. State Univ. College at Geneseo*, 535 F.2d 752, 754 (2d Cir. 1976); *Gibralter v. City of New York*, 612 F.

Supp. 125, 133-34 (E.D.N.Y. 1985), the court should not grant summary judgment unless it is clear that all of the elements have been satisfied. *See Auletta v. Tully*, 576 F. Supp. 191, 194 (N.D.N.Y. 1983), *aff'd*, 732 F.2d 142 (2d Cir. 1984). In addition, "'the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Once the moving party discharges its burden of proof under Rule 56(c), the party opposing summary judgment "has the burden of coming forward with 'specific facts showing that there is a genuine issue for trial.'" *Phillips v. Kidder,y Peabody & Co.*, 782 F. Supp. 854, 858 (S.D.N.Y. 1991) (quoting Fed. R. Civ. P. 56(e)). Rule 56(e) "provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256. Indeed, "the mere existence of *some* alleged factual dispute between the parties" alone will not defeat a properly supported motion for summary judgment. *Id.* at 247-48 (emphasis added).

In reversing a grant of summary judgment, the Second Circuit noted that the "[t]rial court's task at the summary judgment motion state of litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them." *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 65 (2d Cir. 1995) (quoting *Gallo v. Prudential Residential Servs., L.P.*, 22 F.3d 1219, 1224 (2d Cir.

1994)).

B. Defendants' 12(b)(6) Motion to Dismiss for Failure to State a Claim

In seeking to dismiss plaintiffs' Complaint, defendants argue that because the CUNY defendants neither interfered with the funding or the distribution of the *College Voice*, plaintiffs fail to plead a violation of their First Amendment rights. Defendants seek to distinguish this case from the holding in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. at 819 (1995), by arguing that since the *College Voice* was ultimately distributed and did not experience any reduction in funding, no First Amendment violation occurred. Moreover, defendants argue that since the college officials have a legitimate interest in regulating student government elections and ensuring a fair electoral process, they have the responsibility to stop the student candidates from using their "influence with a student newspaper to transform that newspaper into a vehicle for campaign literature." (Defs.' Mem. at 13).

The starting point for this Court's analysis of the issues raised in these motions is the nature of the forum involved and the extent to which the government may regulate speech within that forum.

1. Nature of the Forum

It is a well-established principle of First Amendment law that the government may not regulate speech based on the substantive content of the speech, *see Police Dep't of Chicago v. Motley*, 408 U.S. 92, 96

(1972), or on "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)). However, the government may exercise control over access to government property in order to preserve it for the purposes for which the property was dedicated. *See, Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993) (citing cases).

Thus, in analyzing First Amendment free speech claims, the Supreme Court has defined three categories of forums in which speech may occur: the traditional public forum, the nonpublic forum, and the designated public forum. *See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. at 45-46. Traditional public forums include "streets, parks and places that 'by long tradition . . . have been devoted to assembly and debate.'" *Bronx Household of Faith v. Cmty. School Dist. No. 10*, 127 F.3d 207, 211 (2d Cir. 1997) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. at 45). A nonpublic forum is "government property that has not been opened for public speech either by tradition or by designation." *Id.* (citing *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. at 46).

The third category -- the designated public forum -- is one which "the state has opened for use by the public as a place for expressive activity." *See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. at 45. As the Second Circuit has noted, "the 'designated public forum[]' consists of property that would be a nonpublic forum except for the fact that govern-

ment has intentionally opened it." *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991) (citing *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985); *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. at 45). A subset of the designated public forum is the limited public forum, which the government opens "for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. at 802; *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. at 829; *Perry Educ. Ass'n, v. Perry Local Educators' Ass'n.*, 460 U.S. at 46 n.7; *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d at 692 (observing that "we have identified a sub-category of the designated forum that we have styled the 'limited public forum'").[9]

When the government creates a limited public forum, and grants access to public property for communicative purposes, it may regulate the access to that limited public forum "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. at 806. Thus, in confining the forum to the limited purposes for which it was created, the government may "reserv[e] it for certain groups or for the discussion of certain topics" so long as it does not "exclude

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[9] Courts have blurred the distinction between the terms designated public forum and limited public forum. *See* Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 Stan. L. Rev. 929, 935 (2000).

speech where the distinction is not 'reasonable in light of the purpose served by the forum' . . . nor may the government discriminate against speech on the basis of its viewpoint." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. at 829 (internal citations omitted).

In this case, neither party seems to dispute the fact that the *College Voice*, as a student-run newspaper funded in part by mandatory student activity fees, is a limited public forum. Although student newspapers at CUNY are open to a limited class of speakers consisting of CUNY students, there does not appear to be any subject-matter restriction on this limited public forum.[10] Neither party has cited any rule or regulation of CUNY or CSI that limits the format, content, or subject matter of student publications such as the *College Voice* and indeed, the plaintiffs and the defendants agree that "[i]n accordance with college and university policy granting editorial autonomy to student publications at CUNY colleges, the student editors determine what articles or advertisements are printed in the *College Voice*." (Pls.' 56.1 Stmnt. at 8; Defs.' 56.1 Stmt. at ¶ 8); *see also Leeds v. Meltz*, 85 F.3d 51, 54-55 (2d Cir. 1996) (noting that "CUNY did not, and recognized that it could not, control the

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[10] It should be noted that the public forum at issue here is the student newspaper, not the student activity fees fund as was the case in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). Neither party has presented the Court with evidence of any general regulations governing the distribution of mandatory student activity fees. The 1997 Rule discussed here related to the governance of student elections, not the distribution of student activity fees, and in fact, the term "student activity fees" is never mentioned in the 1997 Rule.

editorial decisions of student editors" and citing a legal memorandum to the CUNY Council of Presidents, dated January 11, 1995, which "expressly disclaim[ed] any right of the institution to control student publications, such as those financed through student activity fees"). Thus, the parameters of the limited public forum here appear to be only that the forum is limited to a certain class of speakers.[11]

In *Rosenberger v. Rector & Visitors of the Univ. of Va.*, the Supreme Court held that the University of Virginia, a state instrumentality, could not withhold funding derived from mandatory student fees from a student newspaper because the newspaper promoted a particular religious philosophy or belief. Like CSI, the University of Virginia collected mandatory nonrefundable student activities fees that were dedicated to funding various student activities, including the magazine at issue in *Rosenberger*. 515 U.S. at 824. The University of Virginia promulgated Guidelines that defined those activities for which funding would be made available. Among the activities excluded by the Guidelines was "religious activity," defined "as any activity that 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate

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[11] In this sense, the status of the CUNY student newspapers is similar to the public forum at issue in *Widmar v. Vincent*, 454 U.S. 263 (1981). In that case, the Court found that the state had created a limited public forum at the University of Missouri by offering student groups at the University the ability to use University facilities for their meetings. A regulation purporting to exclude student groups and speakers from engaging in religious speech was held unconstitutional on the grounds that it was an impermissible content-based restriction on the forum which was "generally open to student groups." *Id.* at 277.

reality.'" *Id.* at 825 (internal citation omitted).

In determining that the University of Virginia had violated the First Amendment by withholding funding from the magazine at issue because it promoted a particular religious philosophy or belief, the Supreme Court concluded that the University had engaged in impermissible viewpoint discrimination because student journals with religious editorial viewpoints were excluded, not because religion as a subject matter was excluded. *Id.* at 831. The Court noted that "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys," *id.* at 828 (citations omitted), and that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829 (citations omitted). "Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* The Court explained the distinction between content and viewpoint discrimination as follows:

> Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited public forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Id. at 829-830 (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. at 46). The Court further recognized that "the distinction is not a precise one" because to discriminate based on the viewpoint of a speaker is of necessity a "subset . . . of content discrimination." *Id.* at 831.

2. Denial of Funding

Turning first to defendants' argument that impoundment of the paper or revocation of funding are the only bases on which plaintiffs can claim a violation of their First Amendment rights, this Court does not agree. While it is true that the Court in *Rosenberger* focused on a refusal of the University to provide funding as the basis for a claimed First Amendment violation, nothing in that case suggests that other means of discriminating or retaliating against a student newspaper based on the viewpoints expressed therein are not equally actionable. *See, e.g., Brooklyn Institute of Arts & Sciences v. City of New York*, 64 F. Supp. 2d 184, 197-98 (E.D.N.Y. 1999) (finding that the Brooklyn Museum had been penalized not only by the City's funding decision, but also by the threat of ejectment from City premises); *see also Romano v. Harrington*, 725 F. Supp. 687 (E.D.N.Y. 1989) (denying defendants' motion for summary judgment because there existed material issues of fact relating to the plaintiff's claim that his termination as faculty advisor to a high school newspaper based on a student's article published in the paper constituted a violation of his First and Fourteenth Amendment rights).

While the CUNY defendants' decision to nullify the

initial result of the 1997 student government election based upon the content of the *College Voice* election edition did not prevent the dissemination of the views expressed by the editors, the CUNY defendants' actions, in calling for a new election and new voting, are alleged to have been an act of retaliation, placing the election of the Student Union candidates in jeopardy. Such an action can have a serious chilling effect on future student publications.[12] As the Supreme Court noted in *Rosenberger*:

> The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition . . . . The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disap-

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[12] Indeed, in his affidavit submitted in support of the preliminary injunction, William Wharton, one of the student plaintiffs and a contributor to the *College Voice*, explained the chilling effect that the cancellation of the election had on the editors and contributors in deciding what to print in future issues of the paper. Specifically, he stated that while the *College Voice* endorsed candidates in 1998 and 1999, the paper's editors deliberately reduced their election coverage to avoid reprisals. (Wharton Aff. ¶ 13; 1/28/00 Hrg. Tr., at 64).

> proval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

515 U.S. at 835-36 (citations omitted).

Thus, to the extent that defendants seek to dismiss plaintiffs' claims on the theory that the cancellation of the election, in the absence of a denial of funding or impoundment of the paper, did not violate the newspaper's First Amendment rights, this Court finds that the caselaw does not support defendants' position. It is clear that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972); *accord Hankard v. Town of Avon*, 126 F.3d 418, 423 (2d Cir. 1997).

3. Protected Speech

Defendants also argue, however, that plaintiffs cannot establish that: "(1) they engaged in speech directed at a matter of public concern and, hence, protected; and (2) the protected speech was a substantial or motivating factor in the adverse decision made by the defendants." (CUNY Defs.' Mem. of Law at 12-13 (citing *Connick v. Meyers*, 461 U.S. 138, 143-49 (1983); *Mount Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 285-87 (1977)).

Turning first to defendants' argument that plaintiffs must establish that the speech was a matter of public

concern, it is clear that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Meyers*, 461 U.S. at 145 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980) and citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982)). However, neither *Connick v. Meyers* nor *Mount Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, hold that protected speech must consist of matters of public concern. Based on the allegations in plaintiffs' complaint and on the undisputed record before this Court, the articles and editorials published in the election issue of the *College Voice* discussing the governance and policies of CSI and the qualifications of the candidates for student government are the quintessential type of expression that the First Amendment was intended to protect. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. at 836 (discussing the unique nature of student intellectual discourse); *Widmar v. Vincent*, 454 U.S. at 267 n. 5 (same). Equally clear from the memorandum of President Springer is the fact that the "speech" reflected in the election issue of the newspaper and the effects of the dissemination of that issue on the fairness of the election were the motivating factors behind President Springer's decision to cancel the election.

The real issue in dispute is whether President Springer's decision was based on a reasonable and constitutionally permissible exercise of content-based restriction designed to confine the speech within the appropriate scope of the limited public forum or whether it was a decision based on impermissible viewpoint discrimination. *See Rosenberger v. Rector &*

Visitors of the Univ. of Va., 515 U.S. at 829-30. Plaintiffs allege that the rationale behind President Springer's decision to cancel the election is clearly set forth in her memorandum announcing the nullification of the Spring 1997 election. In essence, plaintiffs argue that she concluded, based on a review of the content of the May 1997 issue of the *College Voice*, that the election issue was "a thinly veiled student activity fee funded piece of campaign literature for the Student Union Slate" that unfairly influenced the student elections. (Compl. ¶ 57; Decl. of Ronald B. McGuire, dated Oct. 26, 1999, Ex. 1).

Plaintiffs allege that in order for President Springer to conclude that the *College Voice* issue constituted "campaign literature," she had to review the content of the paper. Plaintiffs argue that this content review and her decision to nullify the election results based upon that review is analogous to the University of Virginia's prohibition on publications that promoted a religious editorial position, which the *Rosenberger* Court held was impermissible viewpoint discrimination. Thus, plaintiffs allege that President Springer's actions constituted an impermissible viewpoint-based restriction within the limited public forum.

Plaintiffs' complaint also contains various factual allegations suggesting that President Springer and other members of the CSI and CUNY administration displayed a particular animosity toward the plaintiffs and the specific viewpoints they maintained. In particular, plaintiffs allege that the Student Union party was organized in the fall of 1996 in an effort to promote the interests of CSI students. (Compl. ¶ 74). Specifically, the complaint alleges that members of the

new Student Union party believed that the CSI and CUNY administrators were acting against the interests of CSI and CUNY students, and the Student Union presented a "list of demands" to President Springer and Vice-President Jackson. (*Id.*) When the administration's response to this list was not satisfactory to the Student Union, its members decided to hold demonstrations and to seek publicity in order to express their concerns. (*Id.*) Part of this plan involved running a Student Union slate of candidates in the Spring 1997 election. (*Id.*)

The plaintiffs further allege that in the early 1990s, the *College Voice* was the "official CSI student newspaper." (Compl. ¶ 88). The newspaper maintained that status until it began publishing articles that were "outspokenly critical of the CUNY defendants and their policies." (*Id.*) Several years before the Spring 1997 election, the CSI student government designated *The Banner* as the "official CSI student newspaper." (*Id.*) Plaintiffs claim that the CUNY defendants, including President Springer and Vice-President Jackson, urged the CSI student government to remove the official designation of the *College voice* and to reduce its funding because of the articles and editorials published in the paper which were "outspokenly critical of the CUNY defendants and their policies." (*Id.* ¶ 89).

The complaint further states that members of the *College Voice* and the Student Union have also been active in a group called the "CUNY Coalition," which organizes demonstrations and other activities to publicize views critical of the CUNY administration. (Compl. ¶ 90). Several members of the CUNY Coali-

tion who were graduate students at City College filed a federal lawsuit in 1999 after discovering a hidden camera outside an office where they held meetings. (*Id.* ¶ 91). These same CUNY Coalition members were elected to the City College graduate student government just prior to filing the lawsuit. (*Id.* ¶ 92). Several weeks after the lawsuit was filed, however, the president of City College declared the election "null and void" because a student newspaper allegedly displayed bias in favor of the CUNY Coalition members. (*Id.*)

The plaintiffs also allege that CUNY security officials and administrators compiled a "Black List" of 91 students and faculty in order to monitor their political activities. (Compl. ¶ 95). The "Black List" was circulated to former Chancellor Reynolds and the presidents of the various CUNY colleges in 1995. (*Id.*) Many members of the CUNY Coalition, including at least one of the plaintiffs, were named on the "Black List." (*Id.*) Based on numerous documents released after a Freedom of Information Act request, including the "Black List," plaintiffs assert that there was "an extensive surveillance and intelligence gathering operation by CUNY security personnel and CUNY administrators monitoring on-campus and off-campus activities of student activists." (*Id.*) The documents also revealed "numerous memoranda directed to [Chancellor] Reynolds and CUNY College presidents regarding activities of student protestors that members of the *College Voice* participated in." (*Id.*)

Based upon these factual allegations in the complaint, plaintiffs have alleged that President Springer's classification of the May 1997 issue of the *College*

Voice as "a thinly veiled student activity fee funded piece of campaign literature" was based on the nature of the message conveyed in the newspaper and as such was "presum[ptively] impermissible" viewpoint discrimination, in violation of plaintiffs' First Amendment rights and subject to strict scrutiny. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. at 830; *see also Lamb's Chapel v. Ctr. Moriches Union Free School Dist.*, 508 U.S. at 394; *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. at 800; *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. at 45-46. Even in the context of a nonpublic forum, the Supreme Court has held that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. at 806.

At this stage of the litigation, there has been no discovery conducted on these allegations that defendants acted in retaliation for the positions taken by plaintiffs. However, based solely on these allegations in the complaint, plaintiffs have stated a valid claim that defendants engaged in viewpoint discrimination in violation of plaintiffs' rights under the First Amendment.

C. Plaintiffs' Motion For Partial Summary Judgment

In seeking partial summary judgment, however, plaintiffs have confined their arguments to a claim that "what is unconstitutional is scrutinizing a newspaper to determine whether or not their endorsements

have crossed some line and have become something which is impermissible." (2/9/01 Tr. at 16; *see also* 2/9/01 Tr. at 23, 29). Plaintiffs' position to this Court during the February 9, 2001 hearing was that for purposes of their partial summary judgment motion, they would not press the argument that President Springer was motivated by a particular animus towards the Student Union candidates,[13] nor was it relevant for their purposes to determine whether President Springer relied on the 1997 Rule or not. (2/9/01 Tr. at 16-23).

However, the fact that President Springer had to review the content of the newspaper in order to determine that it constituted campaign literature is not the controlling question presented here. *Rosenberger v. Rector and Visitors of the University of Virginia* made it clear that, in the context of a limited public forum, the State may engage in content discrimination in order to preserve the purposes of the limited public forum, and in doing so, may not only exclude certain groups from participating in the forum, but may also exclude the discussion of certain topics. 515 U.S. 819, 829-830 (1995). By necessity, the State must review the content of the speech to determine whether it is the type of speech that fits within the topics or categories of speech for which the limited public forum was established. *Cf. Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 2492 (2000) (noting that the Court has

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[13] As noted above, plaintiffs originally alleged in their complaint that President Springer's decision to nullify the election was motivated by her animosity toward the particular positions taken and views expressed by the Student Union slate on various issues.

"never held, or suggested, that it is improper" to review the content of speech to determine whether it is prohibited by a particular rule or regulation). Thus, in basing their motion for partial summary judgment on the extremely narrow argument that the review of the newspaper in itself constitutes viewpoint discrimination and a violation of the First Amendment, plaintiffs misconstrue the holding in *Rosenberger* and misapprehend the nature of permissible regulation within the limited public forum. Accordingly, to the extent that plaintiffs have confined their arguments on the motion for partial summary to this narrow argument that review of the paper alone constitutes a First Amendment violation, this Court respectfully recommends that plaintiffs' motion for partial summary judgment be denied.

That does not mean, however, that plaintiffs have failed to state a viable claim. Rather, the question that remains to be determined is whether President Springer's decision was a legitimate exercise of the right of the university to regulate speech within the limited public forum, or whether her decision was based on the views expressed by the *College Voice*. The scope of the limited public forum here, as discussed above, remains largely undefined because there has been limited discovery conducted to date. It appears that the forum is limited to CUNY students but there does not otherwise appear to be any restrictions placed on the subject matter of the forum. Thus, in determining whether President Springer's decision to nullify the election was a reasonable and permissible exercise of content-based restriction within the limited public, the court must first determine whether there was a rule or regulation that defined the scope

of the limited public forum and thus formed the basis for President Springer's determination that the Spring 1997 issue of the *College Voice* fell outside the parameters of the limited public forum as defined by that rule or regulation.

In their arguments before the district court, defendants asserted for the first time that President Springer relied on the 1997 Rule in determining that the *College Voice* had been converted into "campaign literature" and had unfairly tainted the outcome of the election. This Court is particularly troubled by the defendants' prior failure to even make reference to the 1997 Rule or to any regulation specifically prohibiting student funded newspapers from being used as campaign literature. Initially, defendants relied solely on an argument that the decision was well within President Springer's inherent authority to regulate student government elections and ensure a fair electoral process. (Defs.' Prelim. Inj. Mem. at 14). Defendants' subsequent representation to the district court was, however, that President Springer had relied on the 1997 Rule that prohibited student newspapers from being used as posters or "as a *means to distribute* campaign flyers." (Defs.' Objs. at 11 n.2; Jenkins Decl., Ex. 1) (emphasis added).

This Court's concerns regarding defendants' reliance on the Rule were subsequently compounded by defendants' counsel's statement to this Court on February 9, 2001 that in fact, President Springer did *not* rely exclusively on the Rule because it really did not directly prohibit the conduct at issue here. (2/9/01 Tr. at 9-13). Defendants' shifting position before this Court and the district court raises serious questions

of material fact as to what extent, if any, President Springer relied on this Rule in reaching her determination.[14] Although plaintiffs indicated that President Springer's reliance on a rule was irrelevant for purposes of their motion for partial summary judgment, the colloquy at the hearing before this Court makes it clear that there is a disputed issue of fact that would preclude summary judgment on the issue of whether President Springer relied on the 1997 Rule in making her decision.

If President Springer did not rely on the 1997 rule, or on any other rule or regulation, then her actions arguably constituted impermissible viewpoint discrimination. As explained above, CUNY has given editorial autonomy to the student newspapers, thereby permitting the student editors to decide what is published in the papers.[15] In the absence of any established re-

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[14] At one point during argument before this Court, counsel for defendants conceded that any such prohibition was, at best, "implicit" in the Rule. (2/9/01 Tr. at 37).

[15] Here, where there is no evidence to suggest that there was any subject-matter restriction on the limited public forum of student newspapers, the actions of President Springer surpass even the unbridled discretion given to public officials in cases where there is a policy or regulation at issue. *See Hopper v. City of Pasco*, No. 98 CV 35795, 2000 WL 33173121, at *9 (9th Cir. Feb. 15, 2001) (concluding that if a policy or regulation lacks objective standards, "government officials may use their discretion to interpret the policy as a pretext for censorship" and citing cases); *Paulsen v. Lehman*, 839 F. Supp. at 163 (noting that "[a] regulation or ordinance must contain explicit limits on the decisionmaker's discretion" and citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769 (1988)). Although the issue

(continued...)

strictions on the content of student newspapers, the speech contained in the May 1997 edition of the *College Voice* was "otherwise within the forum's limitations." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. at 830; *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d at 693.

Assuming that President Springer relied on the 1997 Rule in reaching her decision, there is still a legitimate question as to whether the 1997 Rule even applies to the May 1997 issue of the *College Voice*. Defendants argued that in providing student activities fees funding for various student activities, CSI had made the determination that it would not be appropriate to fund the campaigns of students seeking election to the CSI student government. (2/9/01 Tr. at 9). According to defendants, the intent underlying the 1997 Rule at issue here was to prohibit the use of campus newspapers funded partially by student activities fees, such as the *College Voice*, from being co-opted by a group of students running for election and converted into "campaign literature" or "campaign flyers" on behalf of those students.[16] (*Id.* at 9-11).

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[15](...continued)
of a public official's discretion usually applies in the licensing context, *see, e.g., City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, this Court is troubled by the apparently unlimited discretion given to President Springer in this case.

[16] Specifically, the CSI administrators take the position that it was unfair for candidates running on the Student Union slate to use their ties to the *College Voice* to obtain "free" publicity supported by student activity fees that was not equally available to other students who were not "friends" with the editorial staff of a student publication. (1/28/00 Hrg. Tr. at 60-623 [sic], 75-76).

The defendants argue that the "content and, indeed, the layout of the election issue of the *College Voice* exceeded the boundaries and purpose of the limited public forum." (Defs.' Mem. of Law dated Feb. 16, 2000, at 4). However, the actual language of the 1997 Rule only prohibits using a student newspaper as a poster or "as a *means to distribute* campaign flyers." (Defs.' Objs. at 11 n.2; Jenkins Decl. Ex. 1 (emphasis added)). During the February 9, 2001 hearing, defendants' counsel essentially agreed that what the rule actually prohibited was inserting campaign fliers between the pages of the newspaper. (2/9/01 Tr. at 6, 10-11). There is no evidence to suggest, and neither party argues, that the *College Voice* was used as a poster or that campaign flyers were inserted into the pages of the issue. Rather, it appears from President Springer's memorandum that she determined that the May issue of the *College Voice* was itself "campaign literature."

Moreover, unlike the CSI election rule in effect in 2000, the 1997 Rule does not directly prohibit student newspapers from being used as campaign literature.[17] If indeed President Springer relied on this 1997 Rule, this Court has serious concerns regarding the vagueness of the Rule and whether it is a legitimate restriction on the limited public forum. It is questionable whether CSI ever sufficiently set forth the standards by which it could be determined that the content of a student newspaper fell outside the

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[17] Indeed, such an interpretation of the 1997 Rule would be difficult to justify based upon a comparison of the language of the 1997 Rule with the rule governing the Spring 2000 elections, which explicitly prohibited the student newspapers from being used as "campaign literature."

established scope of the limited public forum so as to become the type of "campaign literature" which the Rule might be interpreted to prohibit.

Certainly, the *Banner* was permitted to publish the platform statements of student candidates and the parties do not dispute the fact that the *College Voice* and other CUNY publications were permitted to endorse slates of candidates without restriction both before the Spring 1997 election and in the subsequent 1998 and 1999 student government elections. (Pls.' Mem. of Law in Supp. of Mot. for Prel. Inj. at 92; 1/28/00 Hrg. Tr. 67-70). Thus, it does not appear that by publishing the Student Union platform statement or by issuing an endorsement of the Student Union slate or candidates, the *College Voice* deviated from practices previously found to be acceptable and within the limits established by CSI. While defendants have argued that the headline endorsement for the Student Union on the front cover of the May issue and the publication of the Student Union's proposed platform program on the back cover of the issue, were what transformed the May 1997 issue into campaign literature, there has been no discovery to date and no written guidelines to establish that this was specifically prohibited. In this case, if the rule in force in 1997 did prohibit student publications from being used as campaign literature, there were no guidelines to assist the student editors in determining what was a permissible endorsement and what constituted campaign literature. In this case, not only was that 1997 Rule silent with respect to whether student newspapers were permitted to publish endorsements of candidates or slates, but there was nothing explicitly stated in the 1997 Rule that prohibited newspapers from be-

coming "campaign literature."[18]

"For the State to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). It is well established that "[a] law is void on its face if it 'does not aim specifically at evils within the allowable areas of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise' of protected expressive rights." *Paulsen v. Lehman*, 839 F. Supp. 147, 162 (E.D.N.Y. 1993) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)). Thus, where a government administrator is given complete discretion to enforce a regulation which sets forth no standards and can therefore lead to the possibility of impermissible content discrimination, courts have voided the regulation. *Id.* at 163 (discussing the constitutionality of a permit scheme).[19]

Finally, analyzing the 1997 Rule in the context of the limited public forum creates a potentially irreconcilable dilemma. When the government decides to open a nonpublic forum to a certain class of speakers or subject matter, those restrictions need only be "reasonable, in light of the purpose served by the forum and . . . viewpoint neutral." (*Cornelius v. NAACP*

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[18] By contrast, the election rule in effect for the Spring 2000 election, which was quoted to the district court, explicitly prohibited student newspapers from being used as "campaign flyers." (Defs.' 3/17/00 Letter, Attachment A).

[19] *See* discussion *supra* at 29 [192a] n.15.

Legal Defense & Ed. Fund, Inc., 473 U.S. at 806; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 46, 49; *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d at 211-12. After it has opened the forum, "[a]though not required to open the forum in the first place, or to keep it open indefinitely, government is bound by the same standards as apply to a traditional public forum, so long as it maintains the designated public forum." *Travis v. Owego-Apalachin School Dist.*, 927 F.2d at 692 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 46); *see also Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 48). Therefore, once the government has initially established the parameters of the limited public forum, any content-based restriction while the government maintains the forum (even if viewpoint neutral) must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45; *Widmar v. Vincent*, 454 U.S. at 269-70; *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. at 800; *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d at 692.

In this case, assuming that the 1997 Rule was enacted after CUNY designated the student newspapers as a limited public forum, the 1997 Rule could arguably be seen as either a content-based restriction subject to strict scrutiny or as a re-designation of the forum to change the subject matter parameters, which would be subject only to rational basis review. *See* Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 Stan. L. Rev. 929, 939 (2000) (discussing this

incongruous aspect of the limited public forum and proposing an alternative analytical framework). At this stage in the litigation, it is not necessary for this Court to determine how to characterize the 1997 Rule. It is sufficient for purposes of analyzing the defendants' motion to dismiss to note that the 1997 Rule could be construed as an impermissible content-based restriction on the limited public forum.

DEFENDANTS' REMAINING GROUNDS FOR DISMISSAL

Defendants have raised a number of additional arguments seeking dismissal of the claims brought against certain of the defendants. First, defendants contend that Eleventh Amendment immunity bars any claims asserted against CUNY, CSI, or their officers or trustees in their official capacity. Second, defendants contend that plaintiffs' complaint should be dismissed pursuant to Rule 12(b)(6) for failing to allege any personal involvement on the part of defendants Carol Jackson, W. Ann Reynolds, Robert E. Diaz, Roy Moskowitz, Michael Solomon, or Kathleen Galvez in any alleged constitutional violation. Finally, defendants contend that the plaintiffs' state law claims should be dismissed as well. These arguments are addressed below.

A. Eleventh Amendment Immunity

Turning to defendants' first argument, it is well-established that states have historically been immune from suit in federal court pursuant to the Eleventh Amendment unless the state has consented to suit, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S.

89, 100 (1984), or Congress has explicitly abrogated the state's sovereign immunity. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). This immunity has been held to apply where the relief sought would impose a liability to be paid from public funds, *see Edelman v. Jordan*, 415 U.S. 651, 663 (1974), or where the relief sought is equitable in nature. *See Papasan v. Allain*, 478 U.S. 265, 276 (1986); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. at 100-01 (holding that "[t]his jurisdictional bar applies regardless of the nature of the relief sought"); *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594-95 (2d Cir. 1990) (holding that no legal or equitable relief was available against SUNY based on the state's Eleventh Amendment immunity), *cert. denied*, 501 U.S. 1211 (1991). Similarly, where an agency or department of the state has been found to be "for practical purposes . . . the alter ego of the state and the state is the real party in interest," courts have applied Eleventh Amendment immunity to bar an action against the state agency or department. *Santiago v. New York State Dep't of Correctional Serv's*, 945 F.2d 25, 28 n. 1 (2d Cir. 1991) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. at 100 and *Edelman v. Jordan*, 415 U.S. at 663), *cert. denied*, 502 U.S. 1094 (1992).

1. CUNY, CSI and the CUNY Board of Trustees - Federal Claims

The circumstances under which CUNY is considered to be an arm of the state for Eleventh Amendment purposes appear to be unsettled. *See Pikulin v. City Univ. of N.Y.*, 176 F.3d 598, 599 (2d Cir. 1999). Despite several lower court decisions finding CUNY to

be subject to Eleventh Amendment immunity, *see, e.g., Burrell v. City Univ. of N.Y.*, 995 F. Supp. 398, 410-11 (S.D.N.Y. 1998); *Chinn v. City Univ. of N.Y. School of Law at Queens College*, 963 F. Supp. 218, 224 (E.D.N.Y. 1997); *Minetos v. City Univ. of N.Y.*, 875 F. Supp. 1046, 1053 (S.D.N.Y. 1995); *Moche v. City Univ. of N.Y.*, 781 F. Supp. 160, 165 (E.D.N.Y. 1992), *aff'd without opinion*, 999 F.2d 538 (2d Cir. 1993), the Second Circuit in *Pikulin v. City University of New York* noted that the basis for these decisions was an analysis of the state's statutory obligation to indemnify trustees, officers and staff members of CUNY pursuant to Section 6205(1) of New York Education Law.[20] 176 F.3d at 600 (citing cases). The court explained, however, that the appropriate analysis for determining whether an agency is an arm of the state "focuses both on the extent to which the state would be responsible for satisfying any judgment that might be entered against the defendant entity . . . and on the degree of supervision exercised by the state over the defendant entity." *Id.* (citations omitted). It noted that Section 6205 requires indemnification only for individuals affiliated with CUNY and "does not address the state's financial responsibility, if any, to satisfy judgments entered against CUNY itself." *Id.*

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[20] Section 6205 provides in relevant part: "The state shall save harmless and indemnify members of the board of trustees and any duly appointed member of the teaching or supervising staff, officer or employee . . . of the senior colleges under the jurisdiction of such board pursuant to section seventeen of the public officers law against any claim, demand, suit or judgment arising by reason of any act or omission to act by such person occurring in the discharge of his duties and within the scope of his service on behalf of such university." N.Y. Educ. Law § 6205(1).

Indeed, in a footnote, the court noted that the contract at issue in the *Pikulin* lawsuit, which was an action for employment discrimination under Title VII, 42 U.S.C. § 2000e *et seq*. and 42 U.S.C. §§ 1981 and 1983, was registered with the New York City Comptroller's Office and that payments emanated from the City's Treasury. *Id*. at 600 n.3. Given the lack of any basis in the record to determine what the State's financial responsibility would be, the court remanded the case for further proceedings, finding that the evidence in the record did not compel a finding of immunity of behalf of CUNY.

Defendants argue that in this case, it is clear under New York Education Law § 6224(6), that the State of New York would bear the responsibility for the payment of any awards issued against CSI in this federal action. Section 6224(6) provides:

> Notwithstanding any inconsistent provisions of law, with respect to claims against the city university which arise on and after July first, nineteen hundred seventy-nine, the comptroller of the state of New York is authorized to examine, audit, certify for payment and pay from funding sources available for payment of claims by the state any settlement, order or judgment in any federal or state court, other than the court of claims, or any administrative tribunal which pertains to a senior college of the city university of New York.

Thus, defendants argue that since CSI is a senior college as defined under New York Education Law §

6202(5), funds would be paid from the state treasury to satisfy any judgment entered against CUNY or CSI.

The court in *Pikulin* did not address this particular statutory section because that suit involved one of CUNY's community colleges, Kingsborough Community College, and it appears from the limited record before the court in *Pikulin* that the New York City Treasury may have been financially responsible for any judgments emanating from the employment contract at issue. *See Pikulin v. City Univ. of N.Y.*, 176 F.3d at 600 n.3. Here, however, Section 6224(6) speaks directly to the question of who bears financial responsibility for any claims brought against CUNY that relate to the senior colleges. Under this provision, it is clear that any monetary judgment assessed against CSI, as a senior college, or CUNY, as a consequence of the actions taken by CSI or CUNY officials in this case, would be paid for by the state. N.Y. Educ. L. § 6224(6).[21]

At least two district courts considering the question of Eleventh Amendment immunity for CUNY's senior colleges since *Pikulin* have relied on Section 6224(6)

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[21] As noted in this Court's Report and Recommendation, dated March 18, 1999, the state legislature treats the senior colleges in the CUNY system differently in a variety of respects. Specifically, Section 17 of the New York Public Officers Law provides for representation of officials of senior colleges by the State Attorney General's Office to be paid for by the state, while the other colleges in the CUNY system look to the City of New York for representation. *See* Report and Recommendation, dated March 18, 1999, at 5-6; *Apollon v. Giuliani*, 675 N.Y.S.2d 38, 41 (1st Dep't 1998).

and concluded that claims against CUNY's senior colleges are immune based on the two relevant factors defined in *Pikulin* - - the extent to which the state would be financially responsible to satisfy a judgement and the degree of supervision exercised by the state over the defendant entity. *See, e.g., Becker v. City Univ. of N.Y.*, 94 F. Supp. 2d 487 (S.D.N.Y. 2000); *Hester-Bey v. New York City Technical College*, No. 98 CV 5129, 2000 WL 488484, at *2 (E.D.N.Y. Mar. 22, 2000).

In *Hester-Bey*, the court concluded that because Technical College is by statute a senior college of CUNY, *see* N.Y. Education Law § 6202(5), and the New York courts have held that the state is responsible for paying money judgments against a senior college, *see Perry v. City of N.Y.*, 126 A.D.2d 714, 511 N.Y.S.2d 310 (2d Dep't 1987), CUNY and its senior colleges are immune under the Eleventh Amendment. *Hester-Bey v. New York City Technical College*, 2000 WL 488484, at *3-4. The court noted that by contrast, suits brought against CUNY's community colleges are governed by Sections 50-e and 50-i of New York General Municipal Law, rendering the City of New York responsible for the payment of judgments against the community colleges. *Id.* (citing N.Y. Education Law § 6224(1)). Similarly, while claims against CUNY and its senior colleges in tort, contract and wrongful death actions must be pursued in the Court of Claims of the State of New York, N.Y. Education Law § 6224(4), claims against the community colleges are cognizable in state supreme court or county court. *See* N.Y. Gen. Mun. Law § 50-e(7); *Hester-Bey v. New York City Technical College*, 2000 WL 488484, at *3. There are also distinct provisions

for determining the operating and capital budgets for community colleges and senior colleges. *Hester-Bey v. New York City Technical College*, 2000 WL 488484, at *3. After the chancellor of CUNY prepares a proposed budget for a senior college and it is approved by the Board, the proposal is sent to the governor of the state for approval, while proposed budgets for the community colleges are presented to the Mayor of the City of New York for approval. *Id.* (citing N.Y. Education Law §§ 6230 and 6229).

Finally, the court in *Hester-Bey* noted that with respect to the second factor of control cited by the *Pikulin* court, the governor of the State of New York appoints 10 out of 17 members of the CUNY Board of Trustees, including the chair and vice chair, and the state owns the real property of the senior colleges. *Id.*, at 4 (citing N.Y. Education Law §§ 6204(2)(a) & (d), 6213 and 6219).

The court in *Becker* focused on similar factors in determining that the senior colleges are immune under the Eleventh Amendment. *Becker v. City Univ. of N.Y.*, 94 F. Supp. 2d at 490-91. In *Becker*, however, the court also obtained affidavits from the Acting University Controller for CUNY and other state officials indicating that since 1979, the State of New York has assumed responsibility for funding the senior colleges and that the legislature's intent to fully fund. the senior colleges is set forth clearly in Section 6201(1) of N.Y. Education Law. *Id.* at 490.

As the courts in both *Becker* and *Hester-Bey* noted, the language of Section 6224(6) of the New York Education Law, coupled with all of the other indicia

which indicate that the legislature intended the state to be financially responsible for the senior colleges, leads this Court to conclude that CSI, CUNY, and the Board of Trustees are state agencies for purposes of this litigation, and thus, are immune under the Eleventh Amendment.

In their Sur-Reply Memorandum of Law and during oral argument before the Court, plaintiffs, while not conceding the issue, have indicated that they will not contest dismissal of the federal claims against CUNY, CSI, and the CUNY Board of Trustees. (Pls.' Sur-Reply Mem. of Law, dated March 1, 2000, at 22; Tr. at 3-4). Specifically, at oral argument, plaintiffs' counsel stated:

> [W]e believe that the Second Circuit has held that CUNY should not be dismissed as a matter of law. However, it is our position that we will not oppose the dismissal of the federal claims and only the federal claims against those three defendants [CUNY, CSI and the Board] and the reason we do that is because my clients can get the relief they're seeking in terms of injunctive relief and damages from the officers of CUNY with respect to their federal claims.

(Tr. at 3).[22] In light of this representation by plaintiffs that they do not intend to pursue the federal claims for monetary and equitable relief against

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[22] *See also* Letter of Ronald McGuire, Esq., dated February 5, 2001 ("McGuire Letter of 2/5/01" at 2), reiterating plaintiffs' position with respect to the dismissal of these federal claims against CUNY, CSI, and the Board of Trustees.

CUNY, CSI, and the CUNY Board of Trustees, the only remaining questions with respect to CUNY, CSI, and the Board of Trustees is the application of the Eleventh Amendment to plaintiffs' state law claims against these entities.

2. CUNY, CSI, and the Board of Trustees - State Law Claims

In addition to the federal claims asserted against CUNY, CSI, and the Board of Trustees under Section 1983, plaintiffs also claim that the CUNY defendants violated the New York State Open Meetings Law, N.Y. Pub. Off. Law §§ 100-111, by permitting the SERC to conduct business in executive session on May 1, 1997 and May 5, 1997 without fulfilling the requirements of Section 105(1) of the New York Public Officers Law. (Third Amended Complaint ("Compl.") ¶ 122). Plaintiffs also claim that the CUNY Board of Trustees violated the New York State Open Meetings Law by permitting the creation and implementation of viewpoint-based restrictions on expressions in student elections and was negligent in its duty to exercise supervision over the policies and practices of CUNY and CSI officials. (Compl. ¶¶ 131-132). In addition to seeking monetary damages in the amount of $20,000 from each defendant, plaintiffs seek declaratory and injunctive relief under these state law claims.

The Eleventh Amendment has been interpreted as barring suits in federal court based not only on federal claims but also on the basis of state law violations. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. at 97-100; *Dube v. State Univ. of N.Y.*, 900 F.2d at 595. Since this Court concludes that CUNY, CSI,

and the Board of Trustees are state agencies for purposes of this case, the Eleventh Amendment precludes plaintiffs from pursuing both their federal and state law claims against CUNY, CSI, and the Board of Trustees. Moreover, the doctrine of pendent jurisdiction, now incorporated into the statute entitled "Supplemental Jurisdiction," 28 U.S.C. § 1367, does not save plaintiffs state law claims, as plaintiffs argue in their papers. (Pls.' Sur-reply Mem. of Law, dated March 1, 2000, at 23). The Supreme Court has stated that "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. at 121. Accordingly, this Court respectfully recommends that plaintiffs' federal and state law claims against CUNY, CSI, and the Board be dismissed.

3. Officers of CUNY and CSI - Liability for Monetary Damages in their Official Capacity

To the extent that plaintiffs seek money damages from defendants Springer, Jackson, Galvez, Silva, and Brinson in their official capacities as officers of CSI and from Reynolds, Diaz, Moskowitz, Solomon, and Goldstein[23] in their official capacities as officers of CUNY, defendants contend that under New York Education Law § 6205(1), the State is required to

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[23] According to the Third Amended Complaint, all of the individually named defendants are sued in their personal and official capacities except for defendant Goldstein who is sued only in his official capacity. (Compl. ¶ 38).

indemnify members of the CUNY Board of Trustees and any officers or employees of the senior colleges for acts undertaken in their official capacity. Thus, since any funds required to indemnify the CUNY and CSI officials would, by necessity, come from the state treasury, plaintiffs' claims for damages against these individual defendants brought in their official capacities are also barred by Eleventh Amendment immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. at 101 (holding that "[t]he Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest'"). Thus, because the state is obligated to indemnify these public officials, Eleventh Amendment immunity bars suit against them in their official capacity. Accordingly, it is respectfully recommended that the claims seeking monetary damages against Springer, Jackson, Galvez, Silva, Brinson, Reynolds, Diaz, Moskowitz, Solomon and Goldstein in their official capacities be dismissed.[24]

4. Officers of CUNY and CSI - Liability for Monetary Damages in their Individual Capacity

If plaintiffs' claims for monetary damages against defendants Reynolds, Diaz, Moskowitz, Solomon, Silva, Brinson, Springer, Jackson, and Galvez in their official capacity are dismissed, as recommended by this Court, what remains are plaintiffs' claims for monetary damages brought against these officials in

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[24] In his letter dated February 5, 2001, plaintiffs' counsel does not dispute the dismissal of these claims for monetary damages against these individual defendants in their official capacities. *See* McGuire Letter of 2/5/01 at 2.

their individual capacities and plaintiffs' claims for declaratory and injunctive relief.

It is clear that the Eleventh Amendment does not provide immunity for state officials sued in their personal capacity. *See Farid v. Smith*, 850 F.2d 917, 920-23 (2d Cir. 1988); *accord Dube v. State Univ. of N.Y.*, 900 F.2d at 595.[25] However, to the extent that plaintiffs' complaint asserts claims against the individually named defendants for monetary damages in their individual capacities, defendants seek dismissal of the plaintiffs' claims on the grounds that plaintiffs have failed to state a *prima facie* case of a First Amendment violation,[26] and that they have failed to adequately allege any personal involvement on the part of Jackson, Reynolds, Diaz, Moskowitz, Solomon or Galvez.

a. Standards For Supervisory Liability

While supervisory officials may be held liable for Section 1983 violations, the general "rule in this circuit is that when monetary damages are sought under § 1983, the general doctrine of respondeat

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[25] The Second Circuit has noted that although personal capacity suits are not protected by the Eleventh Amendment, other defenses such as absolute or qualified immunity may be available to state officials. *See Farid v. Smith*, 850 F.2d at 923. This Court will not address these possible defenses because they have not been raised by defendants at this time.

[26] Defendants' motion as to the sufficiency of the plaintiffs' First Amendment claims is addressed *supra* at 14-26 [175a-188a], except for the cause of action based on the Fall 1997 election, which is addressed *infra* at 59-62. [227a-231a]

superior does not suffice." *Johnson v. Glick*, 481 F.2d 1028, 1034 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973); *see also Spencer v. Doe*, 139 F.3d 107, 112 (2d Cir. 1998) (affirming the lower court's ruling that § 1983 "does not encompass vicarious liability"). Thus, there must be some showing of "'personal involvement'" on the part of supervisory officials in the constitutional violation. *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (citing *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir. 1991)). Personal involvement can be established by showing that the supervisor "(1) . . . after learning of the [constitutional] violation, failed to remedy the wrong; (2) . . . created a policy or custom under which unconstitutional practices occurred or allowed such policy or custom to continue; or (3) . . . was grossly negligent in managing subordinates who caused the unlawful condition or event." *Spencer v. Doe*, 139 F.3d at 112 (citing *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986) (citations omitted)); *accord Wright v. Smith*, 21 F.3d at 501 (same). In the absence of specific allegations of personal involvement on the part of supervisory officials, courts have held that dismissal of a Section 1983 claim is proper. *See, e.g., Gill v. Mooney*, 824 F.2d 192, 196 (2d Cir. 1987); *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 886 (2d Cir. 1987).

b. Chancellor Reynolds and the Attorney Defendants

A review of the Amended Complaint demonstrates that with respect to certain of the defendants, there are virtually no allegations as to their involvement in the alleged constitutional violations apart from the basic description of their positions at CUNY. Even when considered in light of the liberal pleading

requirements of the Federal Rules, the allegations in the Third Amended Complaint as to Chancellor Reynolds and Robert Diaz are insufficient to allege any personal involvement on their part. Defendant Reynolds is named in only one paragraph of the Third Amended Complaint.[27] In that paragraph it is alleged that she was the Chancellor and chief executive officer of CUNY until the fall of 1997. (Compl. ¶ 26). She has since been replaced by a new chancellor and CEO. *Id.* In the absence of any allegation of Chancellor Reynolds' personal involvement or even supervisory involvement in the acts complained of, the claims for monetary damages brought against her in her personal capacity should be dismissed. Moreover, since she is no longer Chancellor of CUNY and has not been in that position since 1997, plaintiffs' claims for equitable relief against her are also moot.

With respect to defendant Diaz, he is also named in only three paragraphs of the Third Amended Complaint. (Compl. ¶¶ 27-29). He is alleged to have been the Vice Chancellor for Legal Affairs and General Counsel of CUNY until the fall of 1997. (Compl. ¶ 27). It is alleged that in his capacity as General Counsel, Diaz supervised all of the attorneys employed by CUNY and was responsible for implementing university policy. (*Id.*) Defendant Diaz is alleged to have

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[27] Chancellor Reynolds is also mentioned in paragraphs 87 and 95, where it is alleged that the cancellation of the Spring 1997 election was the result of a campaign against students who opposed the chancellor's policies, and that a copy of an alleged "'Black List'" was circulated to Chancellor Reynolds. However, it does not allege that she personally took any actions or that there was any personal involvement on her part. (*Id.* ¶¶ 87, 95).

supervised defendant Roy Moskowitz, Deputy General Counsel of CUNY, and defendant Michael Solomon, Associate General Counsel of CUNY, until Diaz's resignation, at which time Moskowitz became acting General Counsel. (*Id.* ¶ 28). Although defendants Moskowitz and Solomon are alleged "[o] information and belief" to have "advised other Defendants herein to take actions in violation of Plaintiffs' rights under the Constitution and laws of the United States and the laws of New York State" (*id.* ¶¶ 28-29), there are no such allegations in the complaint as to Diaz.[28]

While plaintiffs have alleged that Diaz supervised Solomon and Moskowitz, the complaint fails to allege that Diaz was grossly negligent in supervising the other attorneys in his department. The complaint also does not allege any facts to suggest that Diaz either failed to remedy the wrong upon learning of it, or that he created a policy which permitted the violation to occur. Indeed, nothing in the Third Amended Complaint suggests that either defendant Reynolds or Diaz participated in the discussions leading to President Springer's decision to cancel the CSI election or that these defendants were even aware of the controversy. In the absence of such allegations, all of the claims against Diaz for damages in his personal capacity should be dismissed. Moreover, since he, like Chancellor Reynolds, no longer holds the position of General Counsel or Vice Chancellor for Legal Affairs at CUNY, plaintiffs' claims for equitable relief are no longer viable. Thus, it is respectfully recommended

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[28] It is not even alleged that Diaz personally gave bad advice in this case. At most, he is charged with being Moskowitz's and Solomon's supervisor.

that the claims as to defendants Reynolds and Diaz be dismissed in their entirety.

With respect to defendants Moskowitz, Solomon and Galvez, the Third Amended Complaint alleges that as counsel to CUNY and CSI, they "advised other Defendants herein to take actions in violation of Plaintiffs' rights under the Constitution and laws of the United States and the laws of New York State." (*Id.* ¶¶ 18, 28, 29). Ms. Galvez is also mentioned later in the Third Amended Complaint where it is alleged that, during the second meeting of the SERC on May 1, 1997, Michael Silva, chairman of the SERC, informed McGuire that based on Ms. Galvez's advice, McGuire would not be permitted to address the SERC as counsel for the *College Voice* and several candidates in the election. (*Id.* ¶ 50). Apart from this allegation regarding Ms. Galvez, and the other vague allegation that Moskowitz and Solomon rendered unspecified "advice" to other unnamed defendants to violate plaintiffs' rights, there is no other information in the Third Amended Complaint to suggest when any of these attorneys allegedly gave such advice, to whom such advice was rendered, or the nature of the advice given and its purported connection to the alleged constitutional violations at issue here.

When asked during the course of the oral argument on the motion to explain plaintiffs' claims with respect to the attorney-defendants, counsel for plaintiffs argued that because the decision by President Springer violates the policy of CUNY to give wide latitude to the student press at the colleges, "it is a fair question for inquiry to find out why the Office of Legal Affairs at CUNY was not enforcing CUNY's policy with

respect to freedom of the press . . . Was this a misinterpretation of a law, which I doubt because these were very good experienced lawyers, or was this part of an attempt to harass a political group of students and the deny them their rights." (3/3/00 Tr. at 41). These purported areas of "inquiry" are insufficient to support a claim of personal liability on the part of any of these attorney defendants.

Similarly, the vague, non-specific allegations that Moskowitz, Solomon, and Galvez rendered legal advice in furtherance of the alleged constitutional violations appear to be based on pure conjecture and not on any factual information. Apart from Ms. Galvez, plaintiffs do not even attempt to set forth facts to suggest personal involvement on the part of Solomon or Moskowitz. Indeed, even the few factual allegations as to advice allegedly given by Galvez do not suffice to show her personal involvement in a constitutional deprivation of plaintiffs' rights. At most, the claim against Galvez is that she advised Michael Silva not to allow McGuire to speak to the SERC. (Compl. ¶ 50).

Given the failure of the complaint to articulate how this advice, even if given, constitutes a violation of the plaintiffs' constitutional rights, it is respectfully recommended that the claims in the Third Amended Complaint, for equitable and monetary relief be dismissed as to defendants Moskowitz, Solomon, and Galvez in their entirety.

c. Carol Jackson

Defendants also seek dismissal of the claims as to

Carol Jackson, Vice President for Student Affairs at CSI, arguing that her personal involvement is not sufficiently alleged in the Amended Complaint to support a cause of action under Section 1983. The claims against Carol Jackson are somewhat more specific than the allegations against Chancellor Reynolds and the attorney defendants. It is alleged that Jackson sent an announcement on May 2, 1997 ordering the impoundment of the voting machines and announcing that the votes cast in the student government election would not be released until after President Springer decided the appeal from the SERC's decision. (Am. Compl. ¶ 53). She is also alleged to have met with a group of the plaintiffs and their attorney on May 5, 1997, after the SERC's decision of that date to extend the election to May 10, 1997. She is alleged to have told plaintiffs that despite the SERC's decision, there would be no voting on May 6 and that the votes would not be counted until the appeals had been decided. (*Id.* ¶ 55). The Amended Complaint further alleges that plaintiffs' counsel then faxed an appeal from the May 5th decision of the SERC to both President Springer and Carol Jackson. (*Id.* ¶ 56).

Although still somewhat vague, these allegations suffice to allege a basis for personal involvement on the part of Carol Jackson in the alleged violation. The allegations suggest that she was aware of the controversy, participated in the impoundment of the voting equipment and the decision to halt the election, and that she either participated in the decision-making process that led to President Springer's May 6, 1997 decision or took no action to stop what plaintiffs allege were actions in violation of their First Amendment

rights. Accordingly, at this stage of the litigation, this Court finds that if plaintiffs have sufficiently alleged a First Amendment violation in their complaint, then the allegations in the Third Amended Complaint sufficiently state the minimum necessary to support a cause of action under Section 1983 against Carol Jackson, and it is respectfully recommended that the defendants' motion to dismiss as to Carol Jackson be denied.

d. The SERC and Its Members -- Alston and Geevarghese

Defendants also argued during the March 3, 2000 conference for dismissal of the claims against the SERC pursuant to the Eleventh Amendment on the grounds that the "SERC has no independent existence outside of CSI." (Tr. at 19). However, with respect to SERC members Alston and Geevarghese, defendants' counsel stated: "I'm not asserting the Eleventh Amendment on their behalf because they currently do not hold any official office with CUNY or the state and I think there's a real question whether the comptroller would indemnify them if there is a monetary judgment against them." (*Id.* at 20). He did argue for dismissal of the claims against Alston and Geevarghese individually based on the insufficiency of the allegations of their personal involvement in the alleged constitutional violations, and the fact that they played no role in President Springer's decision. (Tr. at 23-25).

Apart from the fact that defendants' arguments in support of dismissal of the claims against the SERC and its members do not appear to have been articulat-

ed in defendants' motion papers, and therefore, have not been addressed by plaintiffs, this Court finds defendants' position as to the individual SERC defendants to be somewhat incongruous with defendants' position as to the SERC itself. If the SERC is in fact considered an arm or department of the state for Eleventh Amendment purposes, then it is unclear to this Court why defendants do not believe the SERC members are also protected. Given the Second Circuit's cautionary approach in *Pikulin* in determining the status of CUNY entities for Eleventh Amendment purposes, this Court finds that there is insufficient information available at this time to determine whether the SERC and its members are to be considered an agency or officials of the state. *See Pikulin v. City Univ. of N.Y.*, 176 F.3d 598 (2d Cir. 1999).

Accordingly, this Court respectfully recommends that if plaintiffs have alleged a potentially viable First Amendment claim, then defendants' motion to dismiss the claims against the SERC should be denied at this time without prejudice pending discovery and the development of further information regarding the status of the SERC under the Eleventh Amendment.

As to the claims against Alston and Geevarghese in their individual capacities as SERC members, it is clear that they are no longer members of SERC and thus equitable relief would therefore be inappropriate at this time. (Compl. ¶ 66). With respect to plaintiffs' claims for monetary relief against Alston and Geevarghese in their personal capacity, the complaint fails to allege with sufficient specificity what role, if any, they played in a violation of plaintiffs' rights. The only allegations in the complaint as to these two defen-

dants are that they were members of the CSI SERC in the spring of 1997 (*id.* at ¶ 21), that the SERC met to consider a complaint filed by a candidate opposed to the Student Union slate (*id.* at 47-48), and that it issued a finding that the *College voice* had improperly used student activity fees by endorsing candidates in their spring issue. (*Id.* at ¶¶ 48-49). The complaint further alleges that the SERC, as a body, then voted to nullify the spring 1997 election, a decision which was endorsed by defendant Springer following an appeal. (*Id.* ¶¶ 51, 57). Although there are allegations in the complaint that plaintiffs' attorney was denied an opportunity to address the SERC, this allegation names only defendant Michael Silva, Assistant Director of Student Life at CSI and chair of SERC, as the primary actor. (*Id.* ¶¶ 50-51). Because the complaint does not allege any actions on the part of Alston and Geevarghese individually, apart from their vote as members of SERC to nullify the Spring 1997 election, it is respectfully recommended that the claims against these defendants in their individual capacity be dismissed.

B. Plaintiffs' Request for Declaratory and Injunctive Relief

1. Eleventh Amendment

To the extent that plaintiffs continue to seek declaratory and injunctive relief against the remaining defendants, it is clear that notwithstanding principles of Eleventh Amendment immunity, a state official acting in an official capacity may be sued in federal court to enjoin conduct that violates the federal constitution. *See Papasan v. Allain*, 478 U.S. at

276-77; *Dube v. State Univ. of New York*, 900 F.2d at 595; *see also Edelman v. Jordan*, 415 U.S. at 677 (holding that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief. . . and may not include a retroactive award which requires the payment of funds from the state treasury."). This is because "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) (internal citation omitted). Thus, it is clear that state actors may be sued in their official capacities for federal violations for the purpose of obtaining injunctive and declaratory relief and the Eleventh Amendment does not serve as a bar to these claims. *See Ex Parte Young*, 209 U.S. 123 (1908); *Santiago v. New York State Dep't of Correctional Servs.*, 945 F.2d 25, 28-29 (2d Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992); *African Am. Legal Defense Fund, Inc. v. New York State Dep't of Educ.*, 8 F. Supp. 2d 330, 335 (S.D.N.Y. 1998); *Scelsa v. City Univ. of N.Y.*, 806 F. Supp. 1126, 1138 (S.D.N.Y. 1992). However, it is equally clear that "a federal court's grant of injunctive relief against a state official may not be based on violations of state law." *Dube v. State Univ. of N.Y.*, 900 F.2d at 595 (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. at 106). Thus, to the extent that plaintiffs have sued to enjoin CUNY and CSI officials from violating state law, those claims must be dismissed as precluded by the Eleventh Amendment.

2. Mootness

With respect to plaintiffs' claims for injunctive relief based on the alleged violation of plaintiffs' First Amendment rights, there is a serious question as to whether these claims are moot and whether the named plaintiffs have standing to request this type of relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that in a "case of actual controversy" within the jurisdiction of a United States court, the court may "declare the rights and other legal relations" of an interested party "whether or not further relief is or could be sought." Rule 57 of the Federal Rules of Civil Procedure expressly provides that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Fed. R. Civ. P. 57; *see Beacon Constr. Co., Inc. v. Matco Elec. Co., Inc.*, 521 F.2d 392, 397 (2d Cir. 1975). The purpose of the Act is "'to afford a speedy and inexpensive method of adjudicating legal disputes without invoking the coercive remedies of the old procedure, and to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships.'" *Id.* (quoting *Aetna Casualty & Surety Co. v. Quartes*, 92 F.2d 321, 325 (4th Cir. 1937)).

In determining whether a declaratory judgment should issue, the court must determine "'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy an[d] reality to warrant the issuance of a declaratory

judgment.'" *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)); *see also Kidder Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 562 (2d Cir.), *cert. denied*, 501 U.S. 1218 (1991). When a declaratory judgment "'will serve a useful purpose in clarifying and settling the legal relations in issue, and . . . when it will terminate and offer relief from the uncertainty, insecurity and controversy giving rise to the proceeding,'" then a declaratory judgment action should be entertained. *Kidder Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d at 562 (quoting *Fort Howard Paper Co. v. William D. Witter, Inc.*, 787 F.2d 784, 790 (2d Cir. 1986)).

The determination as to whether to grant or deny declaratory relief is left to the discretion of the district court, *see Beacon Constr. Co. v. Matco Elec. Co.*, 521 F.2d at 397, but it is clear that there must be a "real and immediate" controversy in order for plaintiffs to state a legally cognizable claim. *Kidder Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d at 563. Thus, if there is no actual controversy, "there is no discretionary action that a court can take." *Certain Underwriters at Lloyd's London v. St. Joe Minerals Corp.*, 90 F.3d 671, 675 (2d Cir. 1996).

Similarly, in order to obtain injunctive relief to prevent a future harm, the moving party must satisfy the court that there is a cognizable danger of harm if the defendant is not prevented from committing certain acts, *see United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *see also United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952), and there must be a showing that the harm is irreparable in

nature and that there is no adequate remedy available at law. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992); *Northern Cal. Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306 (1984). While the decision to grant injunctive relief is discretionary in nature, *see Hecht v. Bowles*, 321 U.S. 321, 329 (1944), a fundamental prerequisite for granting such equitable relief is the existence of an actual controversy and standing on the part of the moving party. *See O'Shea v. Littleton*, 414 U.S. 488, 493-96 (1974). Even if the plaintiff has been exposed to past injurious conduct, there is insufficient standing to pursue injunctive relief in the absence of any "real and immediate" threat of further injury, *City of Los Angeles v. Lyons*, 461 U.S. at 101-10; *see also O'Shea v. Littleton*, 414 U.S. at 494-96.

It is well-established that federal courts are limited to the "adjudication of actual, ongoing controversies," *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972)), and must dismiss a case when the claims become moot. *See Deakins v. Monaghan*, 484 U.S. at 199; *Video Tutorial Servs., Inc. v. MCI Telecomm. Corp.*, 79 F.3d 3, 6 (2d Cir. 1996) (holding that "[w]hen an appeal becomes moot, we must dismiss it, since we have no jurisdiction over moot controversies") (citations omitted); *see also DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam) (noting that "'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them'") (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). "[A] case becomes moot when the issues presented are no longer live or the parties lack a

legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam) (internal quotations and citations omitted).

The requirement of a live controversy and a legally cognizable interest in the controversy is not satisfied simply by a showing that the controversy existed when the action was first commenced; the "litigant's interest in the outcome [must] continue[] to exist throughout the life of the lawsuit." *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (citations omitted); *accord Deakins v. Monaghan*, 484 U.S. at 199; *Golden v. Zwickler*, 394 U.S. at 110 (holding that in the context of a declaratory judgment action, the proper inquiry was whether an actual controversy existed not at the time of the filing of the action but at the time of the hearing on remand). Moreover, it is well-established that defects in subject matter jurisdiction are not subject to waiver and may be raised at any time. *See Fox v. Board of Trustees of the State Univ. of N.Y.*, 42 F.3d 135, 140 (2d Cir. 1994) (citing *Alston v. Coughlin*, 109 F.R.D. 609, 612 (S.D.N.Y. 1986) (holding that "[t]he mootness doctrine is an elemental limitation on federal judicial power, and its effect may not waived by a party")), *cert. denied*, 515 U.S. 1169 (1995).[29]

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[29] There is an exception to the doctrine of mootness where it can be shown that the "case presents a question that is 'capable of repetition, yet evading review.'" *DeFunis v. Odegaard*, 416 U.S. at 318-19 (quoting *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) and *Roe v. Wade*, 410 U.S. 113 (1973)). Plaintiffs clearly bear the burden of demonstrating that this exception applies. *See Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Here, this Court finds that plaintiffs would not be able to establish

(continued...)

While it is clear that the determination of whether a real and immediate controversy exists is a matter of degree to be made on a case by case basis, *see Kidder Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d at 562, and it may be easier to state a justiciable claim when it is alleged that First Amendment rights are involved, *see Golden v. Zwickler*, 394 U.S. at 110, here there are serious questions as to whether the request for injunctive and declaratory relief is now moot. First, it is clear that the impact felt by the plaintiffs as a consequence of the decision to nullify the 1997 election vote has long since dissipated. In his recent statements to this Court, plaintiffs' counsel noted:

> For example, when this lawsuit was filed in 1997, there was a lot of deep, angry feelings on the part of the students who had just been involved in a very heated election campaign, student Defendants who are involved in a heated controversy

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[29](...continued)
their burden. Plaintiffs must show that "'(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation [or a demonstrated probability] that the same complaining party would be subjected to the same action again.'" *Video Tutorial Servs., Inc. v. MCI Telecomm. Corp.*, 79 F.3d at 6 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). As part of the second requirement of this test, there must a showing that "these same parties are reasonably likely to find themselves again in dispute over the issues raised." *Id.* at 6 (internal quotations and citations omitted). Here, for the reasons stated, unlike the cases in which this limited exception has been applied, it is unlikely that the same circumstances will in fact be repeated. Therefore, the doctrine of "capable of repetition, yet evading review" does not save plaintiffs' claims for equitable relief here.

> with their fellow student Plaintiffs, and there was a lot of controversy between the students, activists and the college administration. A lot of that has gone -- has basically subsided.

(2/9/01 Tr. at 28). The 1997 Rule arguably at issue in this action has been rescinded and is no longer in effect. Indeed, defendants have made assurances to Judge Gershon that the rule in effect in 2000 has also been rescinded and the offending practice has ceased and will not be repeated during the tenure of President Springer. They further assured the district court that there is no likelihood that the defendants will prohibit any student activity fee-funded publication from being used as campaign flyers and posters. (*See* Order of the Honorable Nina Gershon, dated 3/23/00). Moreover, some of the individual defendants against whom equitable relief is sought no longer hold positions at CUNY or CSI.[30] Similarly, with the exception of plaintiff William Wharton who may still be a graduate student at CSI, the students who are currently editors and contributors to the *College Voice*, are not the same individuals who were involved in publishing the May 1997 issue of the *College Voice*, and the Student Union slate on which the student plaintiffs ran is now defunct.

The defendants, however, have not raised the issue of mootness and this Court declines at this time to recommend dismissing the claims for injunctive and declaratory relief on mootness grounds. *See Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979)

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[30] This includes defendants Reynolds and Diaz.

(noting that "voluntary cessation of allegedly illegal conduct . . . does not make the case moot" and "[t]he burden of demonstrating mootness 'is a heavy one'") (quoting *United States v. W. T. Grant Co.*, 345 U.S. at 632-33). This Court is not convinced that defendants' promise not to interfere with the use of student newspapers as campaign literature extends indefinitely into the future. Indeed, the defendants assert only that the restriction will not be repeated during the tenure of President Springer. Therefore, this Court respectfully recommends that the claims for injunctive and declaratory relief not be dismissed as moot at this time.

C. Plaintiff Peseau

In addition, defendants seek to dismiss the claim brought by plaintiff Pesau [sic], a student voter in the initial election, and to dismiss the fourth cause of action, based on the events surrounding the fall 1997 election, as against the members of SERC and President Springer.

Plaintiff Peseau, as a voter in the Spring 1997 election, has the same interest in protecting freedom of speech here as the student journalists and candidates. As the Supreme Court has stated, "where a speaker exists . . . the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc*, 425 U.S. 748, 756 (1976). Pesau [sic] was the type of person that the *College Voice* election issue was intended to target. As a representative student voter in the Spring 1997 election, Pesau [sic] was the

intended recipient of the speech that is at issue here. He therefore has standing to assert the First Amendment claim, along with the student journalists and candidates. *See id.; In re Dow Jones & Co.*, 842 F.2d 603, 607 (2d Cir.) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* for the proposition that potential recipients of speech may bring First Amendment claim), *cert. denied*, 488 U.S. 946 (1988); *NAACP, Los Angeles Branch v. Jones*, 131 F.3d 1317, 1322 (9th Cir. 1997) (noting that "voter plaintiffs, as recipients of campaign speech" may assert a First Amendment claim, citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*), *cert. denied*, 525 U.S. 813 (1998).

D. The Fall 1997 Election

Turning to the fourth cause of action relating to the Fall 1997 election, plaintiffs filed no response to defendants' motion to dismiss this cause of action as against the members of the SERC. According to defendants, plaintiffs have failed to allege any wrongdoing by the members of the SERC during the Fall 1997 election. (Defs.' Mem. of Law, dated December 24, 1999, at 14). Defendants claim that plaintiffs actually state in the complaint that the members of the SERC agreed with plaintiffs when the SERC rescinded Marla Brinson's memo dated October 29, 1997, directing the students not to distribute any flyers bearing the Student Union name. (*Id.* at 14; Compl. ¶ 66).

This Court agrees with defendants. Plaintiffs do not allege any wrongdoing by the SERC during the Fall 1997 campaign. Plaintiffs allege that the SERC

"revers[ed] Ms. Brinson's ruling prohibiting candidates from including the name "Student Union" on their literature . . . [and] ordered that the election be extended for two additional days." (Compl. ¶ 66). Since the only issues plaintiffs raise concerning the Fall 1997 election in their Third Amended Complaint are the memo circulated by Brinson and President Springer's decision to extend voting for only one day (*Id.* ¶¶ 64-67), this Court recommends that the fourth cause of action be dismissed as against the SERC and its members.

This Court also finds that the complaint does not state a cause of action against President Springer based on her actions during the Fall 1997 election. Plaintiffs allege that President Springer retaliated against members of the Student Union platform who were running in the Fall 1997 election by "cancel[ling] one of the two additional days which SERC had scheduled for the election" after the SERC reversed Brinson's decision barring candidates from using the Student Union name in campaign literature. (*Id.* ¶ 66). Plaintiffs claim that "President Springer's decision to cancel voting on one of the two additional days of the extended voting period scheduled by the SERC damaged the Student Union candidates" and that the "CUNY Defendants . . . asserted a continuing authority to review and censor the viewpoints expressed by candidates and their supporters in student election campaigns" (*Id.* ¶¶ 67-68, 84).

Although plaintiffs allege that President Springer's actions during the Fall 1997 election were a form of retaliation, and may have had a chilling effect on the ability of future candidates in student elections to

express their views, plaintiffs have failed to sufficiently articulate a basis on which they allege retaliatory animus on the part of President Springer. If broadly read, plaintiffs' complaint may be suggesting that the defendants' actions in connection with the Fall 1997 election were motivated by the same animus toward the positions taken by the Student Union candidates that allegedly motivated President Springer's earlier actions in the spring of 1997. However, this animus is not specifically alleged in the complaint as the basis for plaintiffs' claim of viewpoint discrimination with respect to the Fall 1997 election[31] and this Court finds nothing else in the complaint to support plaintiffs' allegations that the cancellation of one day of voting was based on unconstitutional and impermissible viewpoint discrimination by President Springer in violation of plaintiffs' First Amendment rights. As noted above, "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972); *accord Hankard v. Town of Avon*, 126 F.3d 418, 423 (2d Cir. 1997). However, even under the liberal pleading standards of the Federal Rules of Civil Procedure, there must be sufficient factual allegations to support the elements of plaintiffs' cause of action, which are lacking with respect to this claim. Accordingly, this Court respectfully recommends that defendants' motion to dismiss the fourth cause of action against President Springer

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[31] Particularly in light of the fact that plaintiffs may have abandoned this claim with respect to the Spring 1997 Election, this claimed basis for the alleged viewpoint discrimination in the Fall 1997 Election is not clear.

be granted.

Defendants also seek to dismiss the fourth cause of action against Marla Brinson for failure to state a First Amendment violation. (Defs.' Mem. of Law in Further Support of CUNY Defendants' Motion to Dismiss, dated Feb. 16, 2000, at 10-11 In the complaint, plaintiffs allege that Brinson issued a memorandum to several of the plaintiffs, which stated: "Please refrain from distributing any additional fliers which read 'Vote Student Union.' The discussion around the charting [sic] of the CSI Student Union is still taking place. Therefore, until this issue is resolved, you are asked to cease and desist from using the name." (Compl. ¶ 64). The complaint alleges that certain plaintiffs were distributing campaign flyers and that Brinson ordered them to stop distributing the flyers because they used the name "Student Union." This is sufficient to allege a First Amendment claim because what plaintiffs are alleging is that Brinson was attempting to prohibit the dissemination of these fliers exhorting a vote for the Student Union, based on the positions taken and the viewpoints expressed by the Student Union members. As such, this claim, if proved, constitutes a restraint of speech in violation of the First Amendment. Any assertion by the defendants that Brinson's decision was legitimately based on the lack of a Student Union charter is an issue for the fact finder and beyond the scope of this motion to dismiss, requiring further discovery. *See Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d at 44 (noting that a motion to dismiss is limited to facts stated in the complaint and documents appended to the complaint or incorporated by reference). Accordingly, it is respectfully recommended that defendants'

motion to dismiss the fourth cause of action as against Brinson be denied.

CONCLUSION

This Court respectfully recommends that plaintiff's [sic] motion for partial summary judgment be denied. It is further recommended that defendants' motion to dismiss for failure to state a First Amendment claim be denied.

This Court respectfully recommends that all claims against defendants CUNY, CSI and the CUNY Board of Trustees be dismissed; that the claims for money damages against Springer, Jackson, Silva, Brinson, and Goldstein in their official capacity be dismissed due to Eleventh Amendment immunity; that all claims against defendants Reynolds, Diaz, Moskowitz, Solomon, Galvez, Alston and Geevarghese be dismissed for failure to allege any personal involvement by these defendants; and that the fourth cause of action be dismissed as against the SERC and its members and President Springer.

Except to the extent that this Court recommends the dismissal of certain injunctive claims against specified individual defendants, as noted above, this Court also respectfully recommends that defendants' motion to dismiss plaintiffs' requests for injunctive and declaratory relief be denied.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within ten (10) days of receipt of this Report. Failure to file objections within the

specified time waives the right to appeal the District Court's order. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72; *Small v. Secretary of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989).

The Clerk is directed to mail copies of this Report and Recommendation to the parties.

SO ORDERED.

/s/ CHERYL L. POLLAK
United States Magistrate Judge
Eastern District of New York

Dated: Brooklyn, New York
May 1, 2001

APPENDIX M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 97 CV 2982 (NG)(CLP)

Decided: May 10, 2002
Filed: May 14, 2002

SARAH HUSAIN, *et al.*,
Plaintiffs,
-v.-
MARLENE SPRINGER, *et al.*,
Defendants.

ORDER

NINA GERSHON, U.S.D.J.:

Plaintiffs move for reconsideration and Reargument of that part of my Order dated March 28, 2002, which denied their motion for partial summary judgment on the ground that I failed to consider their claim that the standard used by President Springer in nullifying the student election was vague and overbroad. Plaintiffs fail to demonstrate that the court overlooked any controlling law. On the contrary, the Order expressly acknowledges that it would be premature to address

certain issues, including the issues plaintiffs now press. *See* Order at p. 4. [61a-63a] The issues of vagueness and overbreadth were not overlooked; the motion is denied.

SO ORDERED.

/s/ NINA GERSHON
United States District Judge

Dated: Brooklyn, New York
May 10, 2002

APPENDIX N

DEFENDANTS' RESPONSE TO PLAINTIFFS' LOCAL CIVIL RULE 56.1 STATEMENT OF UNDISPUTED FACTS[1]

1. The City University of New York ("CUNY") is a public university that operates various colleges and graduate schools pursuant to Articles 125 and 126 of the New York State Education Law ("EDUC") §§ 6201, *et seq.*; §§ 6301, *et seq.*

RESPONSE: Defendants do not dispute this statement of fact.

2. The College of Staten Island ("CSI") is a senior college operated by CUNY that confers baccalaureate and associate degrees. EDUC § 6232.

RESPONSE: Defendants do not dispute this statement of fact.

3. Defendant Marlene Springer has been the President of CSI since 1994. Deposition of Marlene Springer taken July 17, 2002 ("Springer Dep.") at 6.

RESPONSE: Defendants do not dispute this statement of fact.

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[1] This statement was submitted on behalf of Respondent College of Staten Island ('CSI") President Marlene Springer and all the other defendants represented by the New York State Attorney General's office in response to Petitioners' motion for summary judgment against Springer. The Student Senators were not parties to the summary judgment motion.

4. Defendant Carol Jackson is the CSI Vice President for Student Affairs and has held that position at all times relevant to this lawsuit. Deposition of Carol Jackson taken November 22, 2002 ("Jackson Dep.") at 8-9.

RESPONSE: Defendants do not dispute this statement of fact.

5. During the Spring 1997 semester Defendant Michael Silva was the CSI Assistant Director of Student Life, an administrative employee of CSI. Defendant Silva's Responses to Plaintiff's Interrogatories And Document Requests dated January 28, 2003 ("Silva Resp.") Response #3. Silva's supervisors were the Director of Student Life and Vice President Jackson who had overall responsibility for the Department of Student Life. *Id.*

RESPONSE: Defendants do not dispute this statement of fact.

6. In Spring 1997 the Plaintiffs were all CSI students. Declaration of William Wharton dated March 9, 2003 ("Wharton 3/9/03 Dec.") ¶¶2-3.

RESPONSE: Defendants do not dispute this statement of fact.

7. In Spring 1997 Plaintiffs Sarah Husain, Kasadore Ramkisson, Neil Schuldiner and William Wharton were four of the five editors of the *College Voice*, a student newspaper and political journal primarily funded by mandatory student activity fees paid by all CSI students. Wharton 3/9/03 Dec. ¶4.

RESPONSE: Defendants do not dispute this statement of fact.

8. Plaintiffs Devon Blinth and Kathleen McHugh were staff members of the *College Voice* in Spring 1997. *Id.* ¶5.

RESPONSE: Defendants do not dispute this statement of fact.

9. Plaintiffs Sarah Husain, Neil Schuldiner, William Wharton, Devon Blinth, Kathleen McHugh, Colleen McGraham and Jeff McGraham were all members of the "Student Union" slate of candidates that ran in the Spring 1997 CSI student elections. Colleen McGraham and Jeff McGraham were not affiliated with the *College Voice* in the Spring 1997 semester. *Id.* ¶9.

RESPONSE: Defendants do not dispute this statement of fact.

10. In Spring 1997 Plaintiff Marc Peseau was a CSI student who was not affiliated with the *College Voice* or the Student Union who voted in the CSI Student Election held between April 30 and May 3, 1997. Deposition Of Marc Peseau taken November 21, 2002 ("Peseau Dep.") at 14, lines 21-25; Declaration of Mark J. Peseau dated January 25, 2001 [215] ("Peseau 1/25/01 Dec."), ¶2.

RESPONSE: Defendants do not dispute this statement of fact.

11. Mark Peseau read the May 1997 issue of the

College Voice before voting in the first Spring Election. Peseau Dep. at 34; Responses to Defendants' First Set Of Interrogatories To Plaintiff Marc Peseau dated November 21, 2002 ("Peseau Res.") Responses ##7, 8.

RESPONSE: Defendants do not dispute this statement of fact.

12. Plaintiff Mark Peseau did not vote in the Second Spring Election. Peseau Res. #12.

RESPONSE: Defendants do not dispute this statement of fact.

13. EDUC § 6206[7] authorizes the CUNY Board of Trustees (the "CUNY Board") to require students at colleges and schools operated by CUNY to pay mandatory fees dedicated to the support of student government and other student activities and to regulate the expenditure of those funds. EDUC § 6206[7] states in relevant part:

> In all courses and courses of study [the CUNY Board] may, in its discretion, require students to pay library, laboratory, locker, breakage and other instructional and non-instructional fees and meet the cost of books and consumable supplies. In addition to the foregoing fees and charges, the board of trustees may impose and collect fees and charges for student government and other student activities and receive and expend them as agent or trustee.

EDUC § 6206[7].

RESPONSE: Defendants do not dispute this statement of fact.

14. At all times relevant to this lawsuit all students at CSI have been required to pay mandatory student activity fees in an amount set by the CUNY Board as a condition for registering for classes. In Spring 1997 full time CSI students paid student activity fees of $53.00 per semester per semester of which $13.79 was earmarked for a general fund to be allocated by the CSI Student Government for various extracurricular activities, including support for student publications. The fee for part time students was $27.00 of which $5.70 was earmarked for the Student Government's general fund. Declaration Of Ronald B. McGuire dated April 10, 2000 [192][2] ("McGuire 4/10/00 Dec."), ¶5 and Exh. 2.

RESPONSE: Defendants do not dispute this statement of fact.

15. The allocation of student activity fees at CSI and other CUNY colleges is governed by Article 16 of the CUNY Board of Trustees Bylaws ("CUNY Bylaws"). Exh. 4, 4/10/00 McGuire Dec. [192]. CUNY Bylaw 16.2 specifies the purposes for which student activity fee funds may be spent and includes support for "publications and other media." CUNY Bylaw 16.2[5]. *Id.*

RESPONSE: Defendants do not dispute this statement of fact.

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[2] "[###]" denotes the docket number of documents assigned by the E.D.N.Y. clerk's office.

16. The *College Voice* is a student newspaper and political journal primarily funded by CSI student activity fees. Wharton 3/9/03 Dec. ¶7. CSI also has other student publications funded by student activity fees including the *Banner*, which is designated the official campus newspaper by the Student Government; a literary arts magazine named the *Third Rail*; and various other student publications. Wharton 3/9/03 Dec. ¶12. A student radio station is also supported by student activity fees. *Id.*

RESPONSE: Defendants do not dispute this statement of fact.

17. The May 1997 issue of the *College Voice* was funded entirely by student activity fees. Wharton 3/9/03 Dec., ¶7.

RESPONSE: Defendants do not dispute this statement of fact.

18. The *College Voice* publishes articles and editorials on a wide range of topics, including articles on CSI, CUNY, local, national and international affairs, reviews and poetry. Exhibits 1 through 4 to 10/26/99 Wharton Aff. [137]. The editors of the *College Voice* choose the material that the newspaper publishes without any supervision or prior review by anyone other than the editors and staff of the newspaper. Wharton 3/9/03 Dec. ¶14. The *College Voice* is an extracurricular activity and the editors and staff do not receive any academic credit for their participation on the student newspaper. *Id.* The newspaper has a faculty adviser who does not review or approve articles prior to publication. *Id.*

RESPONSE: Defendants do not dispute this statement of fact.

19. CUNY and CSI created a limited public forum by establishing a student activity fee dedicated in part to the support of student publications and other expressive activities by students. Memorandum Of Law In Support Of CUNY Defendants' Motion To Dismiss dated 12/24/99 at 9 [147].

RESPONSE: This is a conclusion of law, and therefore, requires no response.

20. CUNY's policy regarding regulation of student newspapers and publications is set forth in a Memorandum by CUNY Vice Chancellor for Legal Affairs Robert E. Diaz dated January 11, 1995 entitled *Regulation of Speech by an Institution of Higher Education* (the "1995 Diaz Mem."); Springer Dep. Exh. 1 [Bates 074-083]; McGuire 3/1/00 Dec., Exh.1.; *I ·eds v. Meltz*, 85 F.3d 81, 85 (2d Cir. 1996).

RESPONSE: For the purposes of this motion only, defendants do not dispute this statement of fact. However, the 1995 Diaz Mem. was not adopted as a policy, or otherwise authorized by the CUNY Board of Trustees, in accordance with N.Y. Educ. L. § 6204(1). Rather, the 1995 Diaz Mem. is a guidance memorandum that was issued to the Council of President by CUNY's Vice Chancellor of Legal Affairs Robert E. Diaz. The 1995 Diaz Mem. expressly states at its beginning "the purpose of the memorandum is to set forth the framework for analyzing a wide variety of free speech issues which may arise on campus and thereby enable campus personnel to respond to a

variety of situations." *See* 1995 Diaz Mem. at 1, a copy of which is included in Exh. 1 to Springer Dep. at 74-83.

21. CUNY's policy regarding the regulation of content in a student newspaper is set forth in the 1995 Diaz Mem. as follows:

> The First Amendment protection of freedom of speech and of the press apply to student newspapers and other publications. Therefore, a public university may not impose any content-based prohibition on such publications except to serve a "compelling state interest" (again, a standard that is very difficult to meet) [citing *Papish v. Board of Curators*, 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1972)]. Similarly, a public university may not take adverse action against a student newspaper (such as withdrawing its funding) or against a particular student because it disagrees with the content of a student newspaper. While a college may not interfere with the content of student publications, it may, consistent with the law described earlier, promulgate time, place and manner restrictions regarding the distribution of student publications.
>
> The Supreme Court has held in a case involving a high school newspaper, that schools may exercise some editorial control over "school sponsored" publications (*i.e.*, produced as part of a journalism class or otherwise under school auspices) based on "legitimate pedagogical concerns" [citing *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed. 2d 592 (1988)]. Even

> if this analysis were held applicable to post-secondary institutions, which is doubtful, it has very little applications to student-run publications, such as those financed through student activity fees.

Springer Dep. Exh. 1 at [Bates 079].

RESPONSE: For the purposes of this motion only, defendants do not dispute this statement of fact.

22. CUNY's policy prohibiting content based restrictions in a limited public forum is stated in the 1995 Diaz Mem. as follows:

> While college or university property may not fall into the "quintessential" public forum category, the Supreme Court has held that property that the government has made available for expressive activity by the public also constitutes a public forum [citations omitted]. This category (often called a "limited public forum") has been broadened to include not just physical sites but "channels of communication" opened for public speech. [Citing *Student Government Association v. University of Massachusetts*, 868 F.2d 473 (1st Cir. 1989)]. Once a public institution creates such a public forum, even if it was not required to create it in the first place, the institution cannot regulate expressive activity in that forum based on its content. [Citation omitted].

Spring Dep. Exh. 1 at [Bates 080].

RESPONSE: For the purposes of this motion only,

defendants do not dispute this statement of fact.

23. The 1995 Diaz Mem. "expressly [disclaims] any right of the institution to control student publications, such as those financed by student activity fees." *Leeds v. Meltz*, 85 F.3d at 85.

RESPONSE: While defendants do not dispute that the quoted language is found in *Leeds v. Meltz*, 85 F.3d 51, 54 (2d Cir. 1996), the Second Circuit described the 1995 Diaz Mem. in the *Leeds* decision as a "legal memorandum," *id.*

24. CUNY and CSI have not placed any restrictions on subjects that may be covered in the *College Voice* or the *Banner*.
Schuldiner 3/9/03 Dec, ¶7; Wharton 3/9/03 Dec., ¶14. Transcript of Hearing before Hon. Cheryl L. Pollak, U.S.M.J., January 28, 2000 ("1/28/00 Tr.") [271] at 56.

RESPONSE: Defendants do not dispute this statement of fact.

25. The editors of the *College Voice* determine what articles and editorials will be published without any prior review or censorship. Wharton 3/9/03 Dec. ¶14.

RESPONSE: Defendants do not dispute this statement of fact.

26. The *College Voice* is not prohibited from publishing articles and editorials expressing opinions or endorsing candidates in student elections. Transcript, Deposition of Carol Jackson taken November 21, 2002 ("Jackson Dep.") at 74. Wharton 3/9/03 Dec., ¶15.

RESPONSE: Defendants do not dispute this statement of fact.

27. The *College Voice* and student newspapers at other CUNY colleges endorse candidates in Student Government elections. Wharton 3/9/03 Dec. ¶15; Exhibits 2, 5 and 6 to Wharton 10/26/99 Dec. [137].

RESPONSE: Defendants do not dispute this statement of fact.

28. There is no rule or regulation prohibiting or restricting the editors or staff members of the *College Voice* from running for student government positions or from endorsing themselves. 1/28/00 Tr. [271] at 56. Wharton 3/9/03 Dec. ¶15.

RESPONSE: Defendants do not dispute this statement of fact.

29. CUNY requires its constituent colleges to establish elected student governments. CUNY Bylaw 15.2[b]. Article 15 of the CUNY Bylaws is appended McGuire 4/10/00 Dec. [192] Exh. 3. CUNY Bylaw 15.2[b][1] delegates to the respective student governments the power to charter and regulate "teams (excluding intercollegiate athletics), publications, organizations, associations, clubs or chapters" [original parenthesis]. *Id.*

RESPONSE: Defendants do not dispute this statement of fact.

30. CUNY Bylaws 16.3 and 16.4 delegate to the respective student governments the right to allocate

a portion of the student activity fee reserved for student government activities to activities that directly benefit students at the respective colleges. McGuire 4/10/00 Dec. Exh. 4. The CSI Student Senate is the official body that discharges the responsibilities of the CSI Student Government ("SG"), as set forth in § 2 of the SG Constitution that is Article VII of the CSI Governance Plan. McGuire 4/10/00 Dec., [192] Exh. 1. Wharton 3/9/03 Dec.

RESPONSE: Defendants do not dispute this statement of fact.

31. The Student Senate elects a president and eight commissioners from among its members. Wharton 3/9/03 Dec., ¶18; McGuire 4/10/00 Dec. [192], Exh. 1, §§ 4[e][1], 5[a] and 6[a]. One of the SG commissioners chairs a "Commission On Publications" that is responsible for regulating student publications, including the *College Voice*. *Id*. In the 1996-1997 academic year the allocation of student activity fees to the *College Voice* and other the student publications was made by the Student Senate based on recommendations of the Publications Commission. Wharton 3/9/03 Dec., ¶18. Any expenditure of student activity fees approved by the Student Senate is subject to review and approval by the "College Association", a thirteen member board composed of students, faculty and administrative staff members. CUNY Bylaw 16.5. McGuire 4/10/00 Dec. [192] Exh. 4.

RESPONSE: Defendants do not dispute this statement of fact.

32. Each Spring CSI holds annual student elections

for members of the Student Senate as well as student members of the College Council; the College Association; the Auxiliary Services Board; and the college faculty-student disciplinary committee. Wharton 3/9/03 Dec., ¶19. The Auxiliary Services Board is a board composed of faculty, students and administrative staff that contracts services for such functions as the college bookstore and cafeteria services and allocates revenue derived from those enterprises. *Id.* See also CUNY Bylaw 16.10, McGuire 4/10/00 Dec., Exh. 4. The CSI College Council is a college governance body composed elected student and faculty representatives. *Id.* CUNY Bylaw 15.5[c] provides for the annual election of a panel of students who serve as members of the faculty-student disciplinary committees at each college. McGuire 4/10/00 Dec., Exh. 3. The students elected in the spring elections serve one year terms beginning after the end of the Spring semester. Wharton 3/9/03 Dec., ¶19.

RESPONSE: Defendants do not dispute this statement of fact.

33. In 1997 the Spring election was held from April 30 to May 3, 1997 (the "Spring Election"). Wharton 3/9/03 Dec., ¶20.

RESPONSE: Defendants dispute this statement of fact. While voting in the Spring 1997 student government elections was scheduled to occur between April 30, 1997 and May 3, 1997, all votes cast in the election were subsequently nullified on May 6, 1997. Springer Dec. at ¶ 12. A second, *de novo* Spring 1997 student government election was held between May 8 and May 16, 1997. *Id.*

34. In the Fall 1996 term a number of CSI students concerned about various issues pertaining to student life at CSI and CUNY began meeting and named themselves the "Student Union". The Student Union presented a list of demands to the college administration, including demands for 24 hour access to the school library and computer center and increased childcare facilities. Wharton Dep. at 30-32; *Corrected* Wharton 1/20/00 Aff. [149] ¶6; Wharton 3/9/03 Dec., ¶21.

RESPONSE: Defendants do not dispute this statement of fact.

35. Several members of the *College Voice* were active in the Student Union. Wharton 3/9/03 Dec., ¶22; *Corrected* Wharton Aff. [149], ¶7; Cmp. ¶41.[3] The February 1997 issue of the *College Voice* published a number of articles and editorials supporting the demands of the Student Union and urging students to join the new organization. Exhibits to 10/26/99 Wharton Aff. [137], Exh. 1 at 1-2, 6, 8-9, 12. The *College Voice* also published articles critical of the incumbent Student Government and its officers. *Id.* at 8-11.

RESPONSE: Defendants do not dispute this statement of fact.

36. In the Spring 1997 semester the Student Union ran a slate of candidates for a total of 37 positions on the Student Senate, the College Council, The College

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[3] "Cmp." denotes the Third Amended Complaint [142].

Association, the Auxiliary Services Board and the faculty-student disciplinary committee. Wharton 3/9/03 Dec., ¶23; Cmp., ¶59. The only slate opposing the Student Union was the Students For Students ("SFS") slate that was composed mainly of incumbent members of the Student Senate seeking re-election. *Id.* Almost all the candidates in the Spring 1997 election were affiliated with the Student Union or the SFS slates. *Id.*

RESPONSE: Defendants do not dispute this statement of fact.

37. Several editors and staff members of the *College Voice* were among the candidates running for 37 positions on the Student Union slate, including Plaintiffs Husain, Blinth, McHugh, Schuldiner and Wharton. Wharton 3/9/03 Dec., ¶24; Cmp. ¶¶12-13.

RESPONSE: Defendants do not dispute this statement of fact.

38. Prior to the Spring Election the editors and staff of the *College Voice* decided to endorse the Student Union slate and to publish a special election issue that the editors intended to have distributed on the campus on April 28, 1997, two days before the beginning of the voting period. Wharton 3/9/03 Dec., ¶25.

RESPONSE: Defendants do not dispute this statement of fact.

39. The 28 page May 1997 issue of the *College Voice* featured a front cover with a group photograph

of twelve candidates running on the Student Union Slate under a bold headline stating "VOTE STUDENT UNION!". Exhibits to Wharton 3/9/03 Dec. ¶26; Wharton 10/26/99 Aff. [137], Exh. 2. The rear cover of the newspaper was devoted entirely to the Student Union's twelve point platform. Page 2 of the issue featured an editorial entitled "VOTE STUDENT UNION" and platform statements by various Student Union candidates were printed on pages 6 and 7. *Id.* The 28 page newspaper also included articles on topics pertaining to international affairs, student government, the CUNY budget, a forum of candidates in the New York City mayoral race, work requirements for students receiving public assistance, campus security, the history of CUNY, the CUNY faculty union, music reviews, poetry, tenant rights and other topics. *Id.* Plaintiffs Husain, Schuldiner, Wharton and Blinth authored articles on various topics that were published in the May 1997 issue. Kevin Spillane, Morgan Healy, Diane Issac, James Murphy and George Springer were also candidates on the Student Union slate who authored articles that were published in the same issue. *Id.*

RESPONSE: Defendants do not dispute this statement of fact.

40. In Spring 1997 the *Banner* also published an election edition that included platform statements including statements from candidates running on both the Student Union and the SFS slate. Schuldiner 3/9/03 Dec., Exh. 2. Candidates on the Student Union slate did not submit platform statements to the *Banner*, which did not editorially endorse any candidates in the Spring Election. Wharton 3/9/03 Dec.,

¶27.

RESPONSE: Defendants dispute this statement of fact. Pursuant to the rules governing candidates for student government in Spring 1997, all candidates were required to submit a platform statement at the time they filed their nomination forms. *See* Schuldiner Dec. at ¶ 6; *see also* Springer Dep. at Exh. 4. All platform statements submitted by candidates were thereafter printed in the May 1997 issue of *The Banner*. *See* Schuldiner Dec. at ¶ 6.

41. On April 28, 1997 the editors of the *College Voice* were informed that although the May 1997 special election issue had been printed, Student Government Publications Commissioner Juergen Schnetzer directed the printer not to release the issue from the printer's shop. Affidavit of Sarah Husain dated 5/5/97, ¶¶3-4. Mr. Schnetzer was a member of the SFS slate who was running for re-election. *Id*.

RESPONSE: Defendants do not dispute this statement of fact.

42. The editors of the *College Voice* retained an attorney who sent a faxed letter to CSI President Marlene Springer on April 29, 1997 requesting that she order the immediate release of the newspaper from the printer. Wharton 3/9/03 Dec., ¶29; Cmp. ¶¶5, 45; Springer Dep. at 59-60; Springer Dep. Exh. 9 (Letter to CSI President Marlene Springer from Ronald B. McGuire dated April 29, 1997); McGuire 2/1/00 Dec., Exh. 1.

RESPONSE: Defendants do not dispute this state-

ment of fact.

43. President Springer consulted with Vice President Jackson and directed Jackson to insure that the newspaper be released from the printer. Springer Dep. at 60-61.

RESPONSE: Defendants do not dispute this statement of fact.

44. Mr. Schnetzer refused Vice President Jackson's request that he rescind his order impounding the May 1997 issue of the *College Voice*. Deposition of Carol Jackson on November 22, 2002 ("Jackson Dep.") at 54-55.

RESPONSE: Defendants do not dispute this statement of fact.

45. On April 29, 1997 the Student Senate met in closed session to consider the request by the college administration that the Senate override Mr. Schnetzer's decision to impound the newspaper. 1/28/00 Tr. at 91-100. The Student Senate refused to override Mr. Schnetzer's order to impound the newspaper. *Id.* Immediately following the Student Senate meeting Vice President Jackson told SG President Joseph Canale that President Springer was overruling the SG's decision and that the newspaper would be delivered to the campus. *Id.* at 100.

RESPONSE: Defendants do not dispute this statement of fact.

46. Following the April 29, 1997 Student Govern-

ment meeting CSI Vice President Jackson directed college employees to pick up the impounded issue of the newspaper at the print shop and deliver it to the campus. Jackson Dep. at 59. Later that afternoon the May 1997 issue of the *College Voice* was delivered to the campus by college employees. *Id.*, Cmp. ¶46.

RESPONSE: Defendants do not dispute this statement of fact.

47. CUNY Bylaw 15.2[d] requires each CUNY college to establish a Student Election Review Committee ("SERC") to approve procedures in and certify results in student elections. McGuire 4/10/00 Dec., [192] Exh. 3. Any party adversely affected by a decision by the SERC may appeal to the College President who has the final authority regarding certification of student election results and adjudication of complaints of violations of election rules. Student Advisory Memorandum #2 by Vice Chancellor Robert E. Diaz dated August 1, 1990. Banks 12/24/99 Dec. [147], Exh. B; Springer Dep. Exh. 1 [Bates 133-135].

RESPONSE: Defendants do not dispute this statement of fact.

48. In Spring 1997 Michael Silva served as Chair of the CSI SERC. Wharton 3/9/03 Dec., ¶35.

RESPONSE: Defendants do not dispute this statement of fact.

49. In Spring 1997 Andre Woods was an incumbent member of the Student Senate who was running for

re-election on the SFS slate. Wharton 3/9/03 Dec., ¶36. Mr. Woods also served as Student Government Elections Commissioner during the 1997 Spring Election. *Id.* After the *College Voice* was delivered to campus Mr. Woods filed a complaint with the SERC alleging that the *College Voice* election issue violated one of the rules governing campaigning in the Student Election and requested that "any candidate found in that aforementioned issue of the *College Voice* by any means such as a Platform Statement or otherwise be disqualified from the ongoing elections". *Id.*, Jenkins 3/23/00 Dec. [187], Exh. 1. Springer Dep. Exh. 1 [Bates 0033-0034]. The Rule referred to by Mr. Woods was attached to his complaint and read:

> 2. The campus newspapers may not be used as posters on walls, bulletin boards, etc., and may not be used as a means to distribute campaign flyers.

Jenkins 3/23/00 Dec. [187], ¶3 and Exh. 1 at 2.

RESPONSE: Defendants do not dispute this statement of fact.

50. At a meeting in April 30, 1997 the SERC considered Mr. Woods' complaint and passed a resolution not to sustain the complaint that Rule 2 of the election code governing candidates had been violated. Springer Dep. Exh. 1 [Bates 002]. However, the SERC passed a second resolution declaring that "The *College Voice* used student activity fee funds allocated to promote the election of particular candidates affiliated with the *College Voice*" and adjourned until the next day to consider further action on Mr. Woods'

complaint. *Id.*

RESPONSE: Defendants do not dispute this statement of fact.

51. There was no allegation before the SERC that the *College Voice* had been used as a poster or distributed as a flyer.

RESPONSE: Defendants do not dispute this statement of fact.

52. On May 1, 1997 the SERC met again to consider Mr. Woods' complaint and passed a motion "to postpone the election and to consider those ballots cast null and void as it is this committee's decision that the electoral process had been compromised beyond its ability to be fair to all candidates." Springer Dep., Exh. 1, [Bates 003].

RESPONSE: Defendants do not dispute this statement of fact.

53. The May 1, 1997 SERC meeting adjourned at 2:20 PM. Wharton 3/9/03 Dec., ¶39. Within minutes the polls were closed and students waiting to vote were told the election was canceled. *Id.* Members of the Student Union slate and their supporters marched to President Springer's office to protest the SERC's decision to nullify the election and to demand that President Springer overrule the SERC and permit the election to continue. *Id.* President Springer subsequently ordered the polls re-opened and declared that she would rule on all election appeals after the election was concluded on May 3rd. *Id.* The polls were

closed for approximately two and a half hours as a result of SERC's decision on May 1st. *Id.*

RESPONSE: Defendants do not dispute this statement of fact.

54. President Springer's decision on the appeals from the SERC was set forth in a memorandum dated May 6, 1997. (The "May 6th Mem.") Springer Dep. at 17.

RESPONSE: Defendants do not dispute this statement of fact.

55. The May 6th Mem. decision stated in relevant part:

> The *College Voice* inappropriately used student activity fee funds to publish and distribute approximately five thousand copies of a twenty-eight page issue of the *College Voice* with a cover boldly encouraging a vote for a particular slate of candidates, some of whom are also staff members of the *College Voice*. Moreover, much of the issue was substantially devoted to supporting the endorsed slate of candidates. I find that this issue amounted to a thinly veiled student activity fee funded piece of campaign literature for the Student Union slate. As a result, the electoral process was compromised beyond its ability to be fair to all candidates, as argued by other candidates who requested nullification of the election.
>
> The April 30th to May 3rd election is therefore declared null and void, and a new election shall

> be scheduled for the period Thursday May 8th, 1997 through Friday, May 16, 1997.

Appended as Exhibit "1" to CUNY Defendants' Response To Plaintiff's First Interrogatory dated October 1, 1998, Springer Dep. at 17-18; Springer Dep., Exh. 2.

RESPONSE: Defendants do not dispute this statement of fact.

56. President Springer testified that the only election rules she relied on in making her decision to nullify the results of the Spring 1997 student election because she concluded that the election coverage in the *College Voice* unfairly favored one set of candidates was the aforementioned rule #2 and rule #5 which states:

> The Student Government will be glad to make you 30 copies of your stamped and approved poster or flyer. All candidates must remove their election materials from the designated areas after the election is over.

Springer Dep. at 51, 56, Exh.4.

RESPONSE: Defendants do not dispute this statement of fact.

57. Although Rule #5 provided that SG would produce 30 posters or flyers, candidates and slates were permitted to post and distribute additional material printed at our own expense. Wharton 3/9/03 Dec., ¶45. In Spring 1997 both slates and some

individual candidates printed their own literature and this was not a violation of Rule #5. *Id.* Rule #5 was not a restriction on the content of student newspapers. *Id.*

RESPONSE: Defendants do not dispute this statement of fact.

58. The second sentence of Rule #5 refers to a requirement that material posted on designated campus bulletin boards requires a stamp from the office of student life. *Id.* The purpose of the stamp was to insure that the person or organization posting the material was authorized to post. *Id.* There was no review of the content of the poster or flyers in the student election campaign. *Id.* Rule #5 only applied to posted material. *Id.* CSI and SG did not require approval or a stamp for the public distribution of leaflets or flyers that were not posted. *Id.*

RESPONSE: Defendants do not dispute the applicability of the requirement for a stamp for posted materials under the first sentence of Rule #5, insofar as this lawsuit does not involve claims regarding posted campaign materials. However, because Rule #5's language limited to 30 the number of copies that could be reproduced using the expenditure of student activities fees, the publication of 5,000 copies of campaign literature as a newspaper violated the spirit of the rule. Springer Dec. at ¶¶ 14-15.

59. President Springer testified that other than rules 2 and 5 cited above, the only rule regulating the coverage of student government elections by CSI student newspapers is the following rule that was

printed on the nomination form for candidates in the Spring 1997 student elections:

> All candidates are **REQUIRED** to submit platform statements for ***each seat they are running for***. Platform statements should be no less than 50 words and no more than 100 words per statement. Statements will be published in the campus newspaper. Statements must be typed or submitted on disk and will not be edited, so be sure you represent yourself clearly and concisely. Deadline for submission of statements is April 21, 1997.
>
> I am aware of the guidelines regarding platform statements and am aware that failure to submit statements for each seat for which I am running for [sic] will result in my disqualification as a candidate: [Emphasis in the original.]

Springer Dep. at 71-72; Springer Supplemental Errata Sheet dated October 30, 2002.

RESPONSE: Defendants do not dispute this statement of fact.

60. The above referenced regulation regarding the publication of candidate platform statements only applied to the *Banner*, as the official campus newspaper. Wharton 3/9/03 Dec., ¶47. The aforementioned regulation did not apply to the *College Voice* or other CSI student publications. Schuldiner 3/9/03 Dec., ¶7. The SG staff regularly submits candidate platform statements to the *Banner* but does not submit the statements to the *College Voice*. Wharton 3/9/03 Dec., ¶48.

RESPONSE: Defendants do not dispute this statement of fact.

61. The Student Government staff submitted the SG candidate statements to the *Banner* which published the statements in its May 1, 1997 edition. Schuldiner 3/9/03 Dec., ¶¶5-6 and Exh. 2.

RESPONSE: Defendants do not dispute this statement of fact.

62. The votes in the Spring Election were counted on May 7, 1997, the day after President Springer nullified the election. Wharton 3/9/03 Dec., ¶41. The Student Union candidates won all 37 positions for which the slate ran candidates. Id.

RESPONSE: Defendants do not dispute this statement of fact.

63. The May 1997 issue was the last issue of the *College Voice* published during the Spring 1997 semester. Wharton 3/9/03 Dec., ¶42.

RESPONSE: Defendants do not dispute this statement of fact.

64. The Student Union candidates won all 37 positions for which they ran in the second Spring election that was held from May 8 to May 16, 1997 (the "Second Spring Election"). Wharton 3/9/03 Dec., ¶43.

RESPONSE: Defendants do not dispute this statement of fact.

65. In Spring 1997 there were no regulations restricting the content of the *College Voice*. Wharton 3/9/03 Dec., ¶49.

RESPONSE: Defendants do not dispute this statement of fact.

66. In Spring 1997 there were no regulations restricting the viewpoints that could be published in the *College Voice*. Wharton 3/9/03 Dec., ¶49.

RESPONSE: Defendants do not dispute this statement of fact.

Defendants' [sic] Are Entitled To Summary Judgment Based On The Responses Above And On Their Local Civil Rule 56.1 Statement, Dated March 7, 2003

1. Defendants respectfully refer the Court to their Local Civil Rule 56.1 Statement, dated March 7, 2003, for a statement of material facts as to which they contend their is no genuine issue to be tried, based on which they are entitled to summary judgment in their favor as a matter of law.

2. The facts disputed in plaintiffs' Local Civil Rule 56.1 Statement, *supra* at ¶¶ 33, 40, 57 [sic][4], are

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[4] Respondents' reference to ¶ 57 was apparently intended to refer to ¶ 58, *supra*.

immaterial to the present action and, thus, do not require a trial.

Dated: New York, New York
July 7, 2003

Respectfully,

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Defendants
By:

/s/
STEVEN L. BANKS (SB-4858)
Assistant Attorney General